TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 3

MAURICE E. TRAVIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 25, 1959
CERTIORARI GRANTED MAY 31, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., SEPTEMBER 16, 1960

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 6060

MAURICE E. TRAVIS, Appellant,

vs.

THE UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS RELIED UPON BY APPELLANT—
Filed December 17, 1958

Comes Now appellant, by his attorneys, and specifies the following points upon which he intends to rely:

1. The trial court erred in denying appellant's Motion for a New Trial.

2. The trial court erred in denying the said Motion for a New Trial without a hearing for the taking of evidence.

Respectfully submitted,

Attorneys for Appellant: Nathan Witt (E.D.), Eugene Deikman.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Pleas and proceedings before The Honorable William Lee Knous, Chief Judge of the United States District Court for the District of Colorado, and The Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

MAURICE E. TRAVIS, Defendant.

No. 14,266, Civil.

MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR A HEARING ON SAID MOTION—Filed October 17, 1958

Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, defendant, by his attorneys, moves for a new trial based on newly discovered evidence and in support thereof shows:

1. Defendant was convicted on February 5, 1958 on four counts of violating 18 U. S. Code, Section 1001, for filing false affidavits in 1951 and 1952 under Section 9 (h) of the Labor Management Relations Act, 1947. He was sentenced to imprisonment for eight years and fined $8,000.00.

2. On the trial, Fred Leonard Gardner was one of the three prosecution witnesses and his testimony was essential to support the judgment of conviction on each of the four counts.

3. Gardner took the witness stand on the trial herein on January 23, 1958 (R. 583).[1] On January 14, 15, and 16, 1958, Gardner had testified for the prosecution on the trial in United States v. West, et al. in the United States District Court for the Northern District of Ohio, Eastern Division, Criminal No. 22230 (R. 664).

[fol. 3] 4. Under cross-examination in the West case, Gardner testified that he had never been in the Armed Forces (West case, Typewritten Transcript of Trial Proceedings, p. 896). As a result of information secured after the trial in the West case that Gardner had served in the Army but had deserted, attorneys for defendants therein communicated with the Department of Justice and under

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[1] References in this form are to the Transcript of Record on appeal (Travis v. U. S., 10th Cir., No. 5879).

date of October 8, 1958, J. Walter Yeagley, Acting Assistant Attorney General, Internal Security Division, advised David Scribner, one of said attorneys, as follows:

> "Reference is made to this Division's letter to you dated September 12, 1958, concerning the case of United States v. West, et al. In that letter you were advised that we were making an appropriate inquiry to determine the accuracy or inaccuracy of the information you had received concerning certain testimony of Mr. Fred L. Gardner during his cross-examination in the West trial.
>
> "In response to our inquiry this Division has now been advised that Army service records of Fred L. Gardner, Army serial No. 6491727, reflect that Fred L. Gardner was born December 13, 1903 at Galena, South Dakota. He served in the United States Army from January 25, 1922 until he was discharged on May 30, 1925, at the expiration of his enlistment. During this period Gardner was absent without leave from February 14, 1924 until March 22, 1924. He was tried by court-martial and sentenced to be confined at hard labor for two months and to forfeit $20.00 a month salary for a like period.
>
> "Also according to Army service records, Fred L. Gardner, Army serial No. 6491727, re-enlisted in the Army on January 21, 1926. During this period Gardner was assigned to Fort Riley, Kansas. The records reflect that he deserted from there on May 11, 1926. There is no record that Gardner ever returned to the service. Records of the Department of the Army reflect that Gardner is not wanted at this time as a deserter."

5. Based on such newly discovered evidence, defendants in the West case filed a motion for a new trial under Rule 33 on October 16, 1958.

6. Although Mr. Yeagley's letter to Mr. Scribner states that Army service records reflect that Gardner was born on December 13, 1903, Gardner testified under cross-exami- [fol. 4] nation on the trial herein that he was born in 1906 and that "I have a birth certificate to bear it out" (R. 667).

7. The information contained in Mr. Yeagley's letter also indicates Gardner gave the following false information to the FBI which is contained in the statements furnished to defendant on the trial herein pursuant to 18 U.S.C.A., Section 3500 (Defendant's Ex. J for Identification):

a. that he was born on July 13, 1906;

b. that he had had no military service;

c. that he had been employed by Dupont Chemical, Niagara Falls, N.Y., from 1925 to 1929; and

d. that he had resided in Niagara Falls, N.Y., from 1925 to 1929.

If Gardner did make such false statements to the FBI, he is subject to prosecution for violation of Section 1001, the statute under which defendant was tried and convicted.

8. If the jury had known that Gardner was a deserter from the Armed Forces, that he had committed perjury in the West case, that he may have committed perjury on the trial herein, that he gave false information to the FBI which was then furnished to defendant on the trial herein, and that he himself had violated the very statute under which defendant was being tried, it is unlikely that the jury would have credited any of Gardner's testimony against defendant, especially in light of the following instruction given by the Court (R. 1222):

"You ladies and gentlemen, as jurors, are the sole judges of the credibility of the witnesses and the weight which is to be given the evidence that has been received in this case.

"In judging the credibility of the witnesses as reasonable men and women you may believe the whole or any part of the testimony of any witness or you may disbelieve the whole or any part of it. You should carefully scrutinize the testimony given and in so doing consider all the circumstances under which any witness has testified, his demeanor, and his manner while on the stand. Consider the witness's intelligence, the re-

[fol. 5] lation which he bears to the parties interested in the outcome of the action, his interest in the outcome of the case, and the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence if at all. Consider such evidence as there may be relating to the reputation of the witness for truth and veracity. Consider each matter which tends reasonably to shed light on the credibility of a witness.

"A witness false in one part of his testimony is to be distrusted in other parts of his testimony. You may reject all or any part of the testimony of a witness who has wilfully testified falsely as to a material point."

9. Furthermore, it is apparent that since 1926, when he deserted from the Army, Gardner has been lying about his background for the same reason that he lied on the witness stand in the West case, on the trial herein, and with respect to the information he furnished to the FBI. He has obviously had to lie to his friends, his associates, his employers, and when necessary, to other agencies of the government, as, for example, when he registered for selective service in 1940, if register he did. A person who has thus spent his entire adult life in lying and concealing the truth is unworthy of belief and it would offend justice to permit a conviction obtained in part on the testimony of such a person to stand. Especially is this the case when such testimony, as here, consists of the uncorroborated admissions of defendant.

10. The newly discovered evidence also gives rise to questions concerning Gardner's motives for testifying for the prosecution, particularly whether he testified because of fear of prosecution or of exposure and in hope of immunity.

11. It is the duty of the government to advise this Court and defendant whether agents or attorneys of the Department of Justice had information that Gardner had deserted from the Armed Forces and that he had therefore committed perjury and made false statements as above set

forth. If is also the duty of the government to bring to the attention of the Court and defendant any other information in its possession or available to it which bears on Gardner's credibility, as, for example, whether he did register for selective service in 1940 and if so, whether he then disclosed the fact of his desertion from the Army in 1926.

[fol. 6] 12. Due diligence has been shown in obtaining the newly discovered evidence above set forth.

13. It is respectfully submitted, therefore, that this motion should be granted and a new trial ordered, or, in the alternative, that a hearing on the motion be held. Since an appeal from the judgment of conviction is now pending in the Court of Appeals, should this Court decide to order a new trial, defendant will seek to have the cause remanded to this Court pursuant to Rule 33.

Respectfully submitted,

Eugene Deikman, Nathan Witt, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER SETTING HEARING ON MOTION—October 21, 1958

This Matter having come on for the setting of the defendant's Motion for New Trial or, in the Alternative, for a hearing on said Motion, it is

Ordered that the defendant's Motion for New Trial or, in the Alternative, for a hearing on said Motion is set for hearing on Wednesday, October 29, 1958, at 9:30 a.m. o'clock in Court Room A, Post Office Building, Denver, Colorado.

Dated at Denver, Colorado, this 21st day of October, 1958.

By the Court:

William Lee Knous, Chief Judge.

[fol. 7]

IN UNITED STATES DISTRICT COURT

ORDER CONTINUING HEARING ON MOTION—October 22, 1958

This Mafter having been set for hearing on defendant's Motion for New Trial or, in the Alternative, for a hearing on said Motion, on October 29, 1958, and the defendant having requested a continuance to Friday, October 31, 1958, and the plaintiff having consented thereto, it is,

Ordered that the defendant's Motion for New Trial or, in the Alternative, for a hearing on said Motion set for hearing on Wednesday, October 29, 1958, be herewith continued to Friday, October 31, 1958, at 11:00 a.m.

Dated at Denver, Colorado, this twenty-second day of October, 1958.

By the Court:

William Lee Knous, Chief Judge.

IN UNITED STATES DISTRICT COURT

STATEMENT WITH REGARD TO KNOWLEDGE OF MILITARY SERVICE OF FRED LEONARD GARDNER—Filed October 31, 1958

Comes Now Donald E. Kelley, United States Attorney for the District of Colorado, and, with respect to paragraph numbered 11 of defendant's Motion for New Trial, herein, states for the information of the Court:

1) That none of the Government attorneys who prosecuted this case had any knowledge of any military service on the part of Government witness Fred Leonard Gardner prior to being informed of these facts by defense attorney Nathan Witt, by letter dated October 10, 1958;

2) That the Department of Justice, including the Federal Bureau of Investigation, also had no such knowledge and, pursuant to appropriate inquiry, first became aware of Gardner's military service from the Department of the Army records following receipt of letter dated Septem-

ber 10, 1958, from David Scribner, Esq., 15 William Street, New York, N.Y.

Donald E. Kelley, United States Attorney for the District of Colorado.

[fol. 8]

IN UNITED STATES DISTRICT COURT

LETTER AND REPLY—Filed October 31, 1958

160 West 77th Street
New York 24, N.Y.

October 9, 1958

E. I. DuPont DeNemours & Co. Buffalo Avenue and 26th Street, Niagara Falls, N.Y.

Gentlemen: I am trying to trace a person by the name of Fred Leonard Gardner who is supposed to have worked for you or your predecessor company Roessler and Hasslacher Chemical Company, as a punchpress operator from 1925 to 1929.

I would appreciate your advising me whether Mr. Gardner worked for you or the predecessor company at any time. If so, I would like the dates of his employment and his occupation.

Sincerely yours,

W:alp

Hal Witt

Mr. Hal Witt
160 West 77th Street
New York 24, New York

Dear Sir: Mr. Fred Leonard Gardner worked for the Roessler and Hasslacher Chemical Company from August 12, 1926 to February 16, 1928, as a handyman in our Cyanide Department.

R. H. Mort
Personnel Interviewer
Electrochemicals Department
E. I. duPont, Niagara Falls, N.Y.

IN UNITED STATES DISTRICT COURT

LETTER—Filed October 31, 1958

160 West 77 Street
New York 24, N.Y.

October 22, 1958

Morrisania Hospital, Walton Avenue and 168 Street, Bronx, New York

Attention: Personnel Department

Re: Fred Leonard Gardner

Gentlemen: I am trying to locate Fred Leonard Gardner, [fol. 9] who is supposed to have worked at your Hospital as an attendant during the period from 1930 to 1936, or perhaps a year or two earlier or a year or two later. 1930-6/14/34*

If you have records pertaining to Mr. Gardner, I should appreciate your advising me if he did work for you at or about such dates and, if so, what his occupation was.

Hospital Attendant*

If you also have his home addresses for the period during which he worked for you, I would appreciate having those also.

113 E. 168 St.*
169 E. 165 St.*
16 Elliott Pl.*
1224 Walton Ave. Bx*
1098 Gerard Ave. Bx*
(Last known address)*

I enclose a self-addressed, stamped envelope for your convenience.

Sincerely yours,

Hal Witt

*Handwritten notation
Enclosure

IN UNITED STATES DISTRICT COURT

MINUTE ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR A HEARING ON SAID MOTION—Entered October 31, 1958

This cause coming on for hearing before the Honorable William Lee Knous, Chief Judge of the United States District Court for the District of Colorado, on the Defendant's Motion For New Trial, Or, In The Alternative, For Hearing On Said Motion, And the Court having heard the statements and arguments of counsel, it is

Ordered that the United States Attorney draw the order in accordance with the ruling of the Court.

[fol. 10]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR A HEARING ON SAID MOTION—Entered November 3, 1958

This matter coming on for hearing this 31st day of October, 1958, upon the motion of the defendant, Maurice E. Travis, for a new trial on the grounds of newly discovered evidence, or, in the alternative, for a hearing on said motion, the defendant appearing by his attorney, Nathan Witt, and the plaintiff appearing by Donald E. Kelley, United States Attorney for the District of Colorado, and the Court having examined the file herein and the plaintiff's response to the motion for new trial or, in the alternative, for a hearing on said motion, and having heard the arguments of counsel and being otherwise fully advised in the premises,

It Is Ordered that the motion for new trial on the grounds of newly discovered evidence or, in the alternative, for a hearing on said motion, be and the same is hereby denied.

William Lee Knous, Chief Judge, United States District Court.

In United States District Court

Notice of Appeal—Filed November 7, 1958

Maurice E. Travis, the appellant, resides at 3117 Ohio Street, Richmond, California.

His attorneys are Nathan Witt, address: P. O. Box 156, New York 23, New York; and Eugene Deikman, address: 600 Mile High Center, Denver 2, Colorado.

On February 5, 1958, after a jury trial, the appellant was found guilty on four counts of an indictment charging that appellant had violated Title 18, United States Code, Section 1001. The first count charged that in an "Affidavit of Noncommunist Union Officer" made on or about December 19, 1951, within the District of Colorado and filed with the National Labor Relations Board in the District of Columbia, the appellant falsely swore that he was not a member of the Communist Party. The second count charged that in the same affidavit he falsely swore that he [fol. 11] was not affiliated with the Communist Party. Count Four charged that on or about December 3, 1952, he falsely swore in a similarly made and filed affidavit that he was not a member of the Communist Party, and Count Five charged that in the same affidavit he falsely swore that he was not affiliated with the Communist Party. On March 28, 1958, a judgment of conviction was entered, and a sentence of four years imprisonment was imposed on each count, the sentences on Counts One and Two to run concurrently and the sentences on Counts Four and Five to run concurrently with each other but consecutively to the first two counts. In addition a fine of Two Thousand Dollars was imposed on each of Counts One and Four. The total sentence and fine was eight years imprisonment and Four Thousand Dollars. From the foregoing judgment and sentence an appeal was perfected to the United States Court of Appeals for the Tenth Circuit, which appeal is now pending in that Court under Number 5879 and styled "Maurice E. Travis, Appellant, vs. United States of America, Appellee," on the docket of that Court.

On October 17, 1958, a Motion for a New Trial or, in the alternative, For a Hearing on Said Motion, on the grounds

of newly discovered evidence was filed in this United States District Court in said original cause. On October 31, 1958, the District Court entered of record an Order denying appellant's Motion for a New Trial or, in the alternative, For a Hearing on Said Motion.

The appellant hereby appeals to the United States Court of Appeals for the Tenth Circuit from said Order denying said Motion for a New Trial or, in the alternative, For a Hearing on Said Motion.

Dated: November 7, 1958.

Attorneys for Appellant: Nathan Witt, Eugene Deikman.

[fol. 12]

IN UNITED STATES DISTRICT COURT

Transcript of Hearing on Motion for New Trial etc.— October 31, 1958

Proceedings had before Honorable William Lee Knous, Chief Judge, United States District Court, District of Colorado, on October 31, 1958, Courtroom A, Post Office Building, Denver, Colorado.

APPEARANCES: Honorable Donald E. Kelley, United States Attorney, District of Colorado; Paul C. Vincent, Esq., Special Attorney, Department of Justice; and Herbert G. Schoepke, Esq., Special Attorney, Department of Justice; appearing for the Government, Nathan Witt, Esq., Attorney at Law, New York, New York, and Eugene Deikman, Esq., Attorney at Law, Suite 600, Mile High Center, Denver, Colorado, appearing for the Defendant.

The Court: Do counsel in this case wish to proceed now, or do you want to come back? We might proceed for half an hour.

Mr. Witt: If it won't inconvenience your Honor, I would rather proceed now.

The Court: We will proceed now and run over the noon hour.

Mr. Kelley: I would like to file this at this time (handing document to Court and counsel).

The Court: You better offer it for the record; there won't be anything in the record. Does Mr. Witt know about this? Just now Mr. Kelley handed me a paper that he said he wanted to submit, and I suggested that he state for the record if Mr. Witt had a copy.

Mr. Kelley: Your Honor, this is a statement in response to a challenge in the motion of the defendants in reference to the knowledge of Government attorneys as to the Army service of the witness Gardner, and primarily submitted for the information of the Court; however, we can have it marked and offer it as an exhibit.

The Court: I think it can just be filed; it is just in the nature of a response to the motion, I gather, isn't it?

Mr. Kelley: Just in response to one sort of charge of bad [fol. 13] faith on the part of the Government.

The Court: I think it can just be marked "filed." You have given Mr. Witt a copy of it?

Mr. Kelley: Yes.

Mr. Witt: Yes.

The Court: You can mark it filed. All right, you may proceed, Mr. Witt.

ARGUMENT BY MR. WITT

Mr. Witt: May it please the Court, this is a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, based on newly discovered evidence, the motion having been filed on October 17th. The motion alleges that Fred Leonard Gardner, one of the three witnesses against the defendant on trial, had deserted from the United States Army in 1926, that on the witness stand in the West case, the conspiracy case in Cleveland, with which your Honor is familiar, and in response to a question he testified that he had never been in the armed forces, and that in connection with the trial in this case he had given the FBI in Butte, Montana false information relating to that matter—the matter of his desertion—and to other related matters, particularly again stating that he had seen no military service, and stating that he had

worked in Niagara Falls, New York at a time inconsistent with the time of his military service; and also he had falsified or apparently had falsified the date of his birth.

The motion sets forth a letter from J. Walter Yeagley, the acting Assistant Attorney General in charge of the Internal Security Division, setting forth the basic factual material, to wit, that records of the Army show that Gardner was in the Army beginning in 1922; that during his first enlistment he was AWOL for a short period and was punished for that, and that he deserted in May of 1926 during the course of his second enlistment.

The motion also sets forth that it is the responsibility of the Government to advise this Court and the defendant as to what Government agents, FBI agents, and Government attorneys who had to do with the West case and this case knew about these facts relating to Gardner's history, indicating that he had committed perjury in the West case and that he had apparently violated Section [fol. 14] 1001 in the Travis case, the very criminal statute under which Travis himself was indicted and convicted.

This document which was just handed to the Court and to me, your Honor, before this argument began, is apparently a statement signed by Mr. Kelley to the effect that none of the Government attorneys and no one else connected with the Department of Justice had knowledge about Gardner's military service, and before the matter was brought to the attention of the Department of Justice in a letter from David Scribner, one of the attorneys in the West case, in September of 1958.

Your Honor, as I understand what is before us this morning, your Honor is considering not only the matter of granting or denying this motion for new trial on its face, but your Honor was also considering whether to conduct a hearing on the motion for the taking of evidence before your Honor grants or denies the motion.

It is our position that this motion on its face warrants an order by your Honor granting a new trial, but that in any event that Your Honor should not deny the motion without first conducting a hearing for the taking of evidence, and I will address myself to this latter point first.

I take it, your Honor, that there is no longer any dispute, although there seems to be some doubt about it when this motion first came to your Honor's attention, I take it now there is no longer any dispute that your Honor has the power on a motion of this kind to conduct a hearing for the taking of evidence. If there were cases in this circuit which I haven't submitted to your Honor yet or to the Government establishing the propriety of that procedure—

The Court: I think that's true.

Mr. Witt: Yes. Now, passing that question and getting to the issues: As to the necessity of a hearing. First—I will come back to the argument that this motion on its face calls for an order granting a new trial; but, I will pass that and address myself first to the question of a hearing for the taking of evidence.

In that connection, your Honor, since this motion was [fol. 15] filed certain other facts have come to our attention as a result of a continuing investigation which I and my associates have been conducting, an investigation relating to Gardner, an investigation that was opened up by these facts relating to his history and particularly his desertion from the Army in 1926, and at this time I would like to submit that material with this apology to the Court. As your Honor knows, one of the requirements in connection with a motion of this kind is that the defense showed due diligence in making the motion, and consequently we hasten to file the motion as soon as we got word of Mr. Yeagley's letter, as the motion itself recites.

Since that time we have been working with our limited resources trying to secure other material about Gardner relating to facts and relating to those aspects of his biography which have been opened up by this newly discovered evidence. In that connection earlier this week I sent Mr. Kelley a copy of a letter from the duPont Company in Niagara Falls, New York, and at this time I ask leave to submit a photostatic copy of that letter as an exhibit in support of the motion and in support of the argument I am making.

The Court: I think they can be filed just like the matter Mr. Kelley submitted this morning.

Mr. Witt: Yes, I am submitting it now, your Honor, so I can refer to it in connection with this argument. I have

the original in my hand, your Honor, and I handed your Honor a photostatic copy. Your Honor will recall that in the FBI material that was submitted to the defense on the trial under Section 3500 it was recited that Gardner worked for duPont Chemical in Niagara Falls, New York as a punchpress operator during a period from 1925 to 1929. On the trial that was Defendant's Exhibit J for identification, if the Court please.

Following the receipt of this letter from Mr. Yeagley, since the facts contained in that letter were inconsistent with the statement in the FBI report about Gardner's employment during that period in Niagara Falls, I had my son and clerk, Hal Witt, write a letter to the duPont Company in Niagara Falls inquiring about Gardner's employment, and the duPont Company through R. H. Mort, its personnel interviewer, replied on the same letter which he had written, the original which I have and the photostat of which I sent Mr. Kelley earlier this week, and [fol. 16] a copy of which I just handed to your Honor; and your Honor will note that the duPont Company advises us as follows:

> "Mr. Fred Leonard Gardner worked for the Roessler and Hasslacher Chemical Company from August 12, 1926 to February 16, 1928, as a handyman in our cyanide department."

In connection with that information I myself went to Moody's Industrial Manual—this is for 1958—to find the history of that company and the history of duPont, and at page 1,381, Moody's Industrial Manual for 1958, it states that duPont took this Roessler and Hasslacher over in 1930 and merged it into itself in 1932, so that in fact during that period from 1926 to 1928 when Gardner worked in Niagara Falls he worked for the Roessler and Hasslacher Chemical Company and not as he advised the FBI apparently that he had worked for duPont Chemical.

You will notice several other errors or lies that Gardner told in his statements to the FBI. First and most important is the discrepancy in the dates. Gardner, as we have seen, told the FBI that he worked for duPont in Niagara

Falls from 1925 to 1929. On the other hand, the records of the company show actually that he worked for the predecessor company from August 26th to February 28th. Certainly this material shows that Gardner said he was living in Niagara Falls as well as the employment history of Gardner in this FBI material—his former residences are also given in the same exhibit—and that also shows, according to Gardner, that he lived in Niagara Falls from 1925 to 1929, and, of course, this material from Mr. Yeagley and this letter from duPont shows that Gardner lied about his residence during that period.

Obviously he was in the Army during that period beginning in 1922 through 1925 until May of 1926. Finally, and perhaps most significant to my mind, although it seems a detail, is the fact that even when Gardner told the FBI what his employment had been he lied or was mistaken about that, having told the FBI that he worked as a punch-press operator, when in fact, according to this letter from duPont, he worked as a handyman. I say that is perhaps most significant because it is a detail that throws light on this man's attitude towards the truth and towards facts. So much for that aspect of the problem in further support of the motion.

[fol. 17] Yesterday, if the Court please, just before I left New York to come to Denver in connection with this argument, I received a letter from the Morrisania Hospital in Bronx, New York, relating to Gardner's employment there. Your Honor will recall in the same FBI document, the same exhibit, that Gardner told the FBI that he worked at that hospital in the Bronx as an attendant from February, 1930 to June, 1936, and your Honor will see in a moment why I emphasize the months, February, 1930 to June, 1936. I followed the same procedure, if the Court please, in connection with trying to get the facts from duPont in this case.

I had my son and clerk write a letter to the hospital after we had inquired by telephone and been advised that if we wrote them a letter they would give us the facts relating to Gardner's employment. I am handing Mr. Kelley a photostatic copy of that, and I am handing one to your Honor, if the Court please. Here again, like in the case

of duPont, the hospital sent us its reply on the same letter we had written, as your Honor will observe.

The Court: I think we better stay with matters that are alleged in the motion. This is really embarking into a hearing, and that is one thing we are to determine. This situation isn't mentioned in your motion at all, is it?

Mr. Witt: Your Honor, I am submitting it in this connection; perhaps I didn't make myself plain. I know there is a procedural problem and I really owe the Court an apology, and I tried to explain why we had no alternative except to do it this way.

The Court: Our primary question here is as you indicated very clearly in your statement: No. 1, whether the allegations contained here in the motion, whether the Court is warranted or required to have a hearing with respect to the matters alleged in the motion; or secondly, whether the motion of itself states a ground to justify such an examination, or for a new trial. This is bringing into this thing something that isn't even involved in the motion.

Mr. Witt: May I explain what I have in mind, your Honor? Perhaps your Honor is correct. I am now submitting this, and this is the only other document of its kind that I have, in support of this argument that the motion [fol. 18] warrants a hearing for the taking of evidence. Now, this could have been submitted in affidavit; in fact, under the rules there is nothing to stop us now from submitting this material in affidavit form.

The Court: Except that it isn't mentioned in your motion.

Mr. Witt: Yes, but, your Honor, the only reason—as I tried to explain—is the question of the time difficulties we have been operating under, and I think your Honor is entitled to consider up to this date, up to any time your Honor acts on the motion, any material supporting the allegations. We say in the motion, your Honor, that the newly discovered evidence opens up the possibility that Gardner has continued to tell lies ever since he deserted from the Army, and this further supports that allegation; and, in other words, further supports the argument that if your Honor is not disposed to grant the motion on its

face, your Honor should give serious consideration to conducting a hearing for the taking of evidence.

Now, just to finish off on this, if I may—

The Court: All right, you may.

Mr. Witt: I was about to say that Gardner's information to the FBI not only stated that he worked for the hospital from June, 1930—from February, 1930 to June, 1936, but also stated in connection with his residences that from 1930 until about November, 1937 that he lived in an apartment house at 1127 Sherman Avenue, Bronx, New York.

Now, this information from the hospital advises us that Gardner worked there from 1930—they don't give the month, as your Honor will see—until June 14, 1934, which is inconsistent with the dates Gardner gave, and also gives us five different residence addresses for Gardner during the period he worked for the hospital, no one of which is the residence address he gave to the FBI on Sherman Avenue, so with respect to both these items, your Honor, the item relating to his employment in Niagara Falls and the item relating to his employment in the hospital, we say, as I said a moment ago, that it either supports the motion or supports our argument that a hearing for the taking of evidence should be conducted.

Now, getting to the legal issues involved, your Honor, as [fol. 19] I read the Government's cases, a list of which I received yesterday, but I have had an opportunity to research them, not having had an opportunity to read the memorandum that was handed to me just before I rose to argue, your Honor, but I assume the memorandum is based on the cases which the Government submitted to us this week, and as I read those cases, your Honor, in this situation none of them are in point, except the two Supreme Court cases which they cite after we had given them to them and to your Honor earlier, and this is the heart of the legal issue in this case, as I see it, your Honor.

Practically all the cases that the Government cites, all the cases, and some fairly new ones, like the Martin case and the Larrison case, and a whole string of oft-cited cases, the Government cites those, as I understand it, for the proposition that a new trial on the ground of newly discovered evidence will not be granted if the newly discovered evidence is—and I use the phrase that is used most often

in these cases—if the newly discovered evidence is merely impeaching.

Now, we say we have no quarrel with those older cases; but, we say that that doctrine, the doctrine of those cases, that expression of the rule is not applicable in this case, because the newly discovered evidence in this case is not merely impeaching. The newly discovered evidence in this case goes to the very basis of Gardner's credibility. The undisputed evidence—leaving aside this new material I referred to a few minutes ago—the undisputed evidence which comes from the Department of Justice itself shows that Gardner was a deserter, a fact that we could scarcely have known at the time of the trial; that he perjured himself in the West case, and that he has apparently violated the same criminal statute which the defendant was convicted of violating.

This newly discovered evidence demonstrates that Gardner was a person who is unworthy of credence altogether, a person who—to put it in lay terms—could not be believed on a stack of Bibles, even when he is talking about where he lived fifteen or twenty years ago, where he worked and when he worked, and so forth and so on, and we allege in the motion that if this thing were further developed that it would show that at least since 1926 Gardner has lied, has had to lie all over the place.

It is obvious that Gardner has had to lie in connection [fol. 20] with every job he obtained since 1926. This new material at least shows that Gardner has failed to account to the FBI and to us in the 3500 statements for the two-year period between 1928 and 1930, which he tried to cover up by saying that he worked in Niagara Falls during that time. Gardner failed to account for the two-year period from 1934 to 1936, which he tried to cover up by stating that he worked for the hospital from 1930 to 1936, when he worked only until 1934.

We say under the cases—aside from those that the Government cites—this is an exceptional situation that doesn't fall within cases like the Martin case and the Larrison case. Even before the two recent Supreme Court cases, the Communist Party case in 351 U.S., there were cases which dealt differently with this kind of a situation than with

the usual situation where the newly discovered evidence can be called merely impeaching.

I refer particularly to the Segelman case, one of the cases which we gave your Honor and the Government, in 83 Fed. Supp., and the Senft case in 274 Fed. at 629. The Segelman case, your Honor, is particularly in point and it is a case which distinguishes cases like the Martin case and the Larrison case. The Segelman case is a case in which at the time of trial the prosecution witness had been convicted of perjury, not in connection with the case in which he was testifying, but an entirely unrelated matter, and the Court refused to permit the defense to show it.

The Court: You observed, of course, in that case that one of the reasons the new trial was granted was because where a witness had been convicted of perjury the Court had to instruct especially on that point. That could never attend in this case unless the witness is subsequently convicted of perjury. What is your observation about that one?

Mr. Witt: Let me say about that—I didn't mean to take time this morning—but, that offers up a very interesting aspect of that case. I should in that connection advise your Honor, as I already have advised Mr. Kelley, that I took the liberty earlier this week after my return to New York of writing to the United States Attorney in Butte, directing his attention to the apparent violation by Gardner of Section 1001, and it is precisely because of the Segelman case and the problem your Honor has just raised that I wrote that letter to the U. S. Attorney in Butte, because it seems to [fol. 21] me that if Gardner has violated 1001 that he, like any other law violator, should be prosecuted; but, aside from that in connection with our responsibility in this case, under the Segelman case it will become important to us if Gardner is prosecuted under 1001 in Butte.

Apart from that, your Honor, there is the obvious problem in the West case. It seems to me that isn't our case, although what has happened there, of course, is of the greatest importance to us here; but, it seems to me that it is the responsibility of the U. S. Attorney in Cleveland where Gardner committed his perjury on the witness stand,

to prosecute Gardner for perjury in that jurisdiction, and if Gardner is convicted either in Butte or in Cleveland or in both places, it seems to me that it would be open to us under the Segelman case to come back to this Court to ask for a new trial on the basis of those developments; but, all we can do now, your Honor, we have to take the situation as we find it; and since the prosecution of this man for his apparent violations of Federal Law is in the hands of the Department of Justice, we say that we are in the situation where the Segelman case does apply.

Whatever one could say about the West case, which in a technical sense isn't ours, it seems very plain to me, especially in view of this additional evidence relating to Gardner from Niagara Falls and from the Bronx, that Gardner violated 1001 in Butte, Montana and should be prosecuted.

In any event, leaving that aside, your Honor, the significance of the Segelman case otherwise is that that case holds, despite the long line of cases of the Martin, Larrison type, that when you are dealing with a question of perjury by a witness, even if the perjury was not in connection with the case itself, was in connection with an entirely unrelated matter, the defendant is entitled to a new trial. I won't take time on the case, but I take it your Honor is familiar with that and the Government is. It is slightly different, but the basic principle is just the same. Also, this Miller case, which I won't take time on. I gave your Honor and the prosecution that citation, 61 Fed. Supp., and it supports us.

Now, I want to say a final word on the two Supreme Court decisions and come back to the question of a hearing. [fol. 22] The Court: I think we probably better recess now. It is 12:20, and I have a matter set at 1:30. Of course, this calendar was set before this motion was continued, which I understand will take but a very few minutes, so I think we better recess until 1:45.

Mr. Witt: Yes, sir.

Mr. Kelley: Your Honor, I would just like to hand up our memorandum which we have already previously given to counsel.

The Court: Very well; you may announce a recess of the Court until 1:30 and a recess in this matter until 1:45.

(Whereupon, the proceedings were adjourned at 12:22 o'clock p.m., October 31, 1958.)

2:10 p.m. Proceedings Oct. 31, 1958

The Court: We will proceed with the arguments in Case No. 14266. You may proceed, Mr. Witt.

Mr. Witt: May it please the Court, I think I was about to say a few words about the two Supreme Court cases which seemed to us to be very much in point, the Communist Party case and the Mesarosh case. If the Court please, as I read those cases it seems to me they represent a fundamental departure or a fundamental development on this entire subject. In both those cases the witnesses in question, three of them in the Communist Party case and one of them in the Mesarosh case, had committed perjury or had apparently committed perjury or testified falsely in other proceedings, and proceedings other than those involved, other than the Communist Party case, and the Mesarosh case.

If we were to take what is said in the older cases, as I call them in the Larrison and Martin line of cases, literally, then in neither of these cases would new hearing, as in the Communist Party case, or new trial, as in the Mesarosh case, have been warranted. But, the Court in those cases declared the doctrine that if a witness is tainted, if he is a person who is unworthy of credibility, even if that appears by testimony or by other material elsewhere outside of the particular case, then his testimony in the particular case must be discarded and not given any credit whatsoever.

[fol. 23] So the old rules about materiality, for example, don't apply, obviously. The old rules about new evidence that is merely impeaching don't apply, and what becomes important in the case of a witness whose credibility is in question, whose fundamental credibility, whose capacity to tell the truth is attacked, then the defendant is entitled to a new trial.

Actually, if the Court please, as I read the older cases, that doctrine declared in those two cases isn't really new. It seems to me implicit in cases like the Segelman case and the Senft case and the Miller case, and even, your Honor, if you read the opinions in Martin and Larrison and Johnson in the Seventh Circuit, which the Government also cites, if you read those carefully you will find hidden away in them implicit in them is this doctrine which the Supreme Court brought out into the open in these two recent and important cases. I will probably have more to say on the subject, if your Honor will permit me in rebuttal to the Government after I hear the Government's argument; but, with that I would like to leave those cases, that problem, and get again, if I may, to the question of the necessity of a hearing for the taking of evidence in this case, unless your Honor is disposed to grant the motion on its face.

Why do we think that a hearing is called for here? We think a hearing is called for here because it seems to us that this newly discovered evidence, including the new material which I presented this morning, merely scratches the surface as far as Gardner is concerned. We allege in our motion that it would seem plain from his original dereliction in 1926 and the necessity for lying and deception that that imposed upon him ever since, opens up the possibility of showing that this man cannot be believed on any subject, and especially—and this, it seems to us, goes to the very heart of this motion—and especially when he is testifying as he did in this case, with respect to two conversations with the defendant at which nobody else was present except in one of them Gardner's family was present at Travis' home. That's the one in June of 1953.

I have in mind the Opper case and the Smith case in the Supreme Court, your Honor, Opper in 348 U.S., dealing with uncorroborated admissions. Here this man testified to two uncorroborated conversations with the defendant, and his testimony, despite the fact that the Government in its memorandum says that his direct testimony covers only a few pages, your Honor having presided on the trial [fol. 24] will, I am sure, agree with me when I say his testimony about those two conversations on the trial was

of the utmost importance. In fact, especially in view of the strength of the argument, as I see it, that we have on the insufficiency of the evidence, it is quite plain to me that without Gardner's testimony about those two conversations the case probably wouldn't have been strong enough to go the jury.

A host of questions suggest themselves about this man's capacity for telling the truth. I adverted to several of those this morning. Why has he covered up what he was doing between 1928 and 1930? Why has he covered up what he was doing between 1934 and 1936? Why does he seem to be under the necessity of lying to the FBI, not only about where he was and when he was there, but about what he was doing there, as in the case of his Niagara Falls experience and the case of his work for the hospital in the Bronx? You get a person like that and I don't see how anybody could argue that he is worthy of belief when years later he takes the witness stand to testify as to what he told a particular man and what the particular man told him.

In the motion we refer to the fact that in connection with his registration for selective service in 1940 he must have run into some difficulty. I think it was in October, 1940 that the universal registration took place. There are only two possibilities as I see it in that connection: One, that this man, because he would have had to reveal his Army record and the fact of his desertion, didn't register at all, or, if he did register, deciding not to run the risk of committing a felony by failing to register, he must have lied about his Army service. That was one of the questions that was asked, as we all know, in connection with registration, as it is today; so that this man was caught on the horns of a dilemma. We don't know the answer to that: we have tried to get the answer. I would like to state that to the Court, but without a subpoena and without a hearing we can't get the answer.

In that connection we submit that it is the responsibility of the Government to get the answer to that question as well as a good many other questions about this man.

Then another category altogether, your Honor, of course, there is no dispute about the fact that in cross examining a

witness you are entitled to know whether he is giving his testimony under the fear of prosecution or exposure or in [fol. 25] the hope of immunity. If we had a hearing and Gardner was a witness, aside from who else might be a witness, we could inquire into that subject. It didn't occur to us to inquire on the trial, because not having known about his desertion from the Army and these lies that he has told over the years and the trouble he might have been in with the Federal Government, we had no basis for such an inquiry, so a hearing would enable us to go into all that, and we say it appears from what we already have that we would be able to prove by a hearing up to the hilt that this man has continuously lived a life of lies and deception since at least 1926.

In this connection, your Honor, may I remind your Honor about some of the things that were brought out in the trial that seemed rather unimportant and minor at the time, but in the light of this newly discovered evidence now assumes great importance, raising the question as to whether or not this man is even capable of telling the truth.

Your Honor will recall that when I cross examined him about statements he had made to the FBI, because I had a basis for impeaching him on the basis of those statements, on several occasions he said the material contained in the FBI report was wrong, that he hadn't given that information to the FBI about his marriage and divorce, which may, as your Honor suggested on the trial, have been a typographical error in the report, so I will pass that one.

Again your Honor will remember that when I questioned him about his elementary school education, because he had told the FBI according to its report that he had had seven years of elementary school education, while we had his testimony before the Senate Subcommittee in 1952 that he had had two years, and he reconciled that contradiction by saying that the FBI got that wrong. Then your Honor will recall that the FBI report stated that Gardner had told them that he had worked for Union Carbide as an official from late '49 to September, 1950, a period of at least nine months, and since that was inconsistent with what he had testified to either in the West

case or before Senator Watkins in 1952, I queried him about that, and his answer to that was that the FBI got it wrong.

As I say, if the Court please, at the time these items didn't seem too important, but now like these other items [fol. 26] with respect to where he worked and when and the jobs he held and all the rest of it, these items assume great importance. I have searched in my own mind as to some rational explanation as to why in terms of this man's original dereliction and the necessity he was under of covering it up, why he would misinform the FBI about where he had worked and how long for Union Carbide and in what position; because I am ready to assume, as I think you probably are, your Honor, that the FBI didn't make any mistake about that. It is hard for me to see how the FBI could put into writing a statement based on conversations by FBI agents with this man, would put in Union Carbide as an official—

The Court: That was all argued to the jury at the time of the trial and that evidence was all admitted in evidence that you are talking about.

Mr. Witt: Your Honor, perhaps I am not— These things were argued to the jury in one context and they weren't all argued to the jury, because of their relative unimportance, but, your Honor, on this new trial motion in light of the newly discovered evidence, what I am now saying to your Honor is that these things have to be seen, these discrepancies, these mistakes, lies, perjuries, whatever you want to call them, have to be seen in another context, and I say that particularly in light of the Mesarosh case where the Solicitor General himself came forward and told the Supreme Court of the United States that the Government had no confidence in this man who had testified in that case, because they had discovered that he had lied elsewhere. At least, I say, it is the responsibility of the Government to come forward and give us a satisfactory answer to these questions, and finally I come to that point.

As I think I said this morning, we want a hearing in order to develop evidence as to the allegation in the motion concerning the duty and the responsibility of the Government with respect to this matter. In response to that Mr. Kelley handed us this morning what is called a statement

with regard to knowledge of military service of Fred Leonard Gardner, in which Mr. Kelley states that no Government attorneys or FBI agents knew about that, and therefore none of them knew about his perjury in the West case and about his lies to the FBI in Butte.

Well, your Honor, under the cases in terms of what I think we are entitled to, this piece of paper isn't sufficient. [fol. 27] I don't think that even an affidavit from Mr. Kelley with these statements would be sufficient. I added up in preparation for this argument the number of FBI agents and attorneys whom Gardner talked to during the period between the summer of 1955 and the time he took the witness stand here early in '58 in connection with Travis, Mine-Mill, the West case or other matters. You remember when we interrogated Gardner about those conversations in connection with Section 3500, and Gardner apparently talked to at least five FBI agents and five attorneys before he took the witness stand in this case, and we think we are entitled to interrogate all those agents and all those attorneys as to their relations with Gardner, and particularly whether they knew that Gardner was a deserter, and as a consequence whether they knew that Gardner testified falsely in the West case and violated Section 1001 in the Travis case.

Finally, even if I am wrong in what I deduce from the Communist Party and Mesarosh cases, your Honor, it seems to me that the prosecution here owes the Court and owes the defendant more of a responsibility in connection with this matter than it is prepared to assume. There is very little doubt in my mind that if this newly discovered evidence had been developed in connection with a defense witness, the Government would be making the most thoroughgoing investigation, as the Government did in the Jencks case when we came up with Matusow's recantation. The Government had its agents active all over the country. It empanelled several grand juries in several districts in order to investigate every possible aspect of the Jencks case and Matusow's recantation. As far as I can tell—and what I am about to say is supported by the fact that Mr. Kelley has done nothing but produce this so-called statement—since the motion for new trial was filed in the

West case and since this motion for new trial was filed in this case, the Government has sat on its hands with respect to this man Gardner, and now if I read their memorandum correctly in light of their statement of Mr. Kelley's, they come in and ask this Court to forget about it; that this man Gardner may have perjured himself in the West case, and he may have violated 1001 in this case, and he may have told a stack of other lies for the last thirty-odd years; but, let's forget about it; Travis was convicted; let him remain convicted.

I submit that the Supreme Court, and the two cases, the Communist Party case and the Mesarosh case and a whole line of cases going way back to the Mooney case, down to [fol. 28] the Alcorta case in the last term of the Supreme Court, the Supreme Court has tried to make it clear to prosecutors that they owe the federal courts and defendants in federal courts much more of the responsibility than that. Thank you, your Honor.

ARGUMENT BY MR. KELLEY

Mr. Kelley: May it please the Court, while the subject of the statement which the Government filed is fresh in the Court's mind, I want to make this further statement in connection with the filing of it, and that is that as a responsible federal employee or agent I made that statement. I think it is complete, and the Government is willing to rest on that statement. Whether Mr. Witt feels that it satisfies him or not is not of particular concern to me.

Now, to show the Court that the Department of Justice acts up to its responsibilities, the Mesarosh case which has been referred to here frequently is the result of the action of the Solicitor General in filing a motion in the Supreme Court while the matter was pending on appeal, pointing up the possibility of perjury of a witness in the trial of that case, and if we felt that such action was justified here that type of action would be taken.

Now, this man Travis was indicted four years ago sometime in the fall of 1954. He was first tried three years ago by a jury of twelve citizens of this community, and he was convicted. The case was reversed solely on the ground of an improper question to a character witness on

cross examination. He was again convicted by another jury of twelve citizens of this community, and the case is now pending on appeal. In neither trial has there been one iota of testimony to the effect the defendant was not a member of the Communist Party at the time he signed the non-Communist affidavits alleged in the indictment.

Now the defendant comes before this Court and asks for a new trial on the ground of alleged perjury committed in a wholly different proceeding. The alleged perjury relates to a matter that was even collateral in the case in which it occurred, if such it was, and it is not even in this case; so on the face of the motion the Court would be justified in denying not only the hearing but the motion for new trial.

Now, I use the term "alleged perjury" advisedly, your Honor. We admit that the record shows a question put to [fol. 29] him at Cleveland in the negative. The question was: "You have never been in the armed forces?" to which he answered, "No." That is a double negative; it is possible that he was denying the statement which counsel had made to him. Now, we concede that Gardner entered the Army on two different occasions. The records of the Department of the Army show that, but until Gardner is given a chance in the West case to explain that, if the Court there feels that it is of sufficient materiality, I am not going to concede or accuse Mr. Gardner of having wilfully lied at all. We don't know whether the reporter correctly got the question or the answer; we don't know whether Gardner correctly understood the question. Those are questions that might be important to the Court in the West case. It is collateral not only to this case—it is not even in this case—and it is wholly unrelated to the issues in the Travis case.

Now, Travis admitted in a statement which was introduced in evidence here without even objection that he was a member of the Communist Party until August of 1949. There was no evidence of any kind that he changed that status, and the presumption is that the status continued. Travis associated with many people in his union and in Communist Party activities. No one came forward to contradict anything Gardner said, nor for that matter, any-

thing that Eckert or Mason said, or the witnesses that testified in the first trial. There is no fact in issue in the Travis case which is controverted.

I wholeheartedly believe in holding the prosecution to high standards of integrity, and I think I would be just as quick to condemn the use of perjured testimony to convict as would Mr. Witt. I do not believe it possible where human beings have to be employed as witnesses, prosecutors, and, yes, even defense attorneys, that you can attain perfection. If the rule Mr. Witt is contending for were adopted by the courts, every conviction in the country could be reversed; especially would this be true where reports are furnished under Section 3500. It would mean that there would have to be a perfect understanding between the questioner—that is, the FBI—and the witness, and that the FBI would report the information obtained without a single error. It would leave no room for estimates or faulty or slightly inaccurate recollections in connection with dates or places, and we all know that memories are not infallible. Who has the infallibility of discernment to determine which of two versions of any event are accurate?

[fol. 30] We have heard six different witnesses in the two trials describe the events, the activities and action of Travis relating to the Communist Party and Communism. It was all consistent and the testimony of Gardner was consistent with that of Eckert and Mason, and Eckert and Mason were the other two witnesses in this last trial. Nothing is raised either in the argument or in the motion to cast any doubt as to the substantial accuracy of Gardner's testimony, and I can urge the Court with a clear conscience and with full recognition of my obligation as a representative of the United States to deny the motion. I can think of nothing less flimsy in the realm of reasoning than to grant a new trial because of an allegedly false statement on a collateral matter in a wholly unrelated case, and that is what the Court has been asked to do.

Now, Mr. Witt has demanded that Mr. Gardner be prosecuted in Montana on 1001 for having told the FBI he had no military record, and possibly for some of these other misstatements. In the first place, the statute requires that the statement has to be made in a matter which is within

the jurisdiction of an agency or department of the Government, and this Court with Judge Pickett sitting has held that these matters which the FBI investigates that arose in other agencies are not matters within the FBI's jurisdiction. And another thing which is true both as to 1001 and as to perjury is that the statements have to be material to the investigation. Mr. Witt brought out on cross examination of Gardner during this trial that the FBI was investigating Mine-Mill and Gardner's Communist Party activities and other matters. They weren't investigating when he was born, what grade he went to in school, where he worked twenty-five or thirty years ago, so those matters are wholly immaterial, and I think it is a fair comment to say that when he was asked about some of these dates, for instance, when he had worked at the hospital, or when he had worked at this plant in Niagara Falls, that he made estimates of when it was.

Unless a person kept accurate records it would be very difficult to tell exactly what you were doing, especially where you have shifted around as Mr. Gardner has from one union to another, from one job to another.

In the Communist Party case the majority opinion at page 123 said this:

> "In considering this non-Constitutional issue raised [fol. 31] by denial of petitioner's motion, we must avoid any intimation with respect to other issues raised by petitioner. We do not so intimate by concluding that the testimony of a witness against whom the uncontested charge of perjury was made was not inconsequential in relation to the issues on which the Board had to pass."

In other words, the pe jury had to be not inconsequential, and had to relate to the issues on which the Board passed. Again on page 124 of this same opinion:

> "If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must take that into account."

Now, the testimony relating to military service in the West case didn't relate to the issues of that case, and there was no testimony in the Travis case at all about the military service.

In Mesarosh the Supreme Court upon the Government's representations—not the defendant's—found that Mazzei's credibility had been wholly discredited. There certainly is nothing on the fact of this motion or suggested by counsel that would wholly discredit the witness Gardner.

I think this is important language from the Mesarosh decision, on page 9, and this I say is important because of the distinction that Mr. Witt attempts to make between old decisions and the new thinking which is represented by Mesarosh and the Communist Party cases. This is the language of the Court:

> "It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial."

Now, note this language, your Honor:

> "Such an allegation by the defense ordinarily will not [fol. 32] support a motion for a new trial, because new evidence which is merely cumulative or impeaching is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial."

Then the Court cites a number of the so-called old cases. Now, in determining whether or not to grant a new trial on the grounds of newly discovered evidence under Rule 33, which is what we are under, federal courts have used either of two recognized tests. The first was originally laid down in the case of Bary vs. State, 10 Ga. 511 at page

572, which required a party seeking a new trial on the ground of newly discovered evidence to show the following vital elements:

> "(a) The evidence must be in fact newly discovered; that is, discovered since the trial. (b) Facts must be alleged from which the Court may infer diligence on the part of the movant. (c) The evidence relied on must not be merely cumulative or impeaching. (d) It must be material to the issues involved, and (e) it must be of such nature as that on a new trial the newly discovered evidence would probably produce an acquittal."

The other test was developed in the case of Larrison vs. United States, 24 F. 2d 82, Seventh Circuit case, wherein the following three requirements were specified:

> "(a) the court is reasonably well satisfied that the testimony given by a material witness is false.
>
> "(b) That without it the jury might have reached a different conclusion.
>
> "(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial."

We have cited in our brief a number of cases, and from the discussion this morning I presume the Court is familiar with most of these cases.

In United States vs. Johnson, 142 F.2d 588 and at 591 the Court explained the distinction between and the applicability of the two rules, pointing out that the Larrison rule is applicable where there has been a recantation or [fol. 33] where it has been proven that false testimony was given at the trial, neither of which we have here. Obviously, the Larrison rule has no applicability in the instant motion since there is no question of false testimony or recantation in this case; however, even in those cases where false testimony was given on the trial, the law is well

settled that unless the false testimony relates to a material issue, a new trial should be denied.

In United States vs. Derosier, a District Court case for the Western District of Pennsylvania, defendants sought a new trial alleging inter alia proof of false testimony of a Government witness by legal Court documents. The Court denied the motion for a new trial, although the testimony of the Government witness did in fact conflict with court records, and held that it would merely tend to impeach the credibility of the Government's witness. The Court said:

> "Ordinarily, newly discovered evidence which goes to the impeachment of a witness and not to facts at issue in the case is not sufficient ground for a new trial."

This basic principle of denying motions for a new trial based upon newly discovered evidence which is merely cumulative, impeaching, or seeks to destroy the credibility of a witness has been frequently stated by the courts.

It is well settled that the matter of granting a new trial based on after-discovered evidence rests in the sound discretion of the trial court, and an order refusing a new trial on that ground would not be disturbed on that appeal in the absence of a plain abuse of discretion.

Now, your Honor, I want to refer to 327 U.S. 106 which the Supreme Court cited or referred to when it was talking about this not being a Rule 33 case. This is the opinion in United States vs. Johnson, which will be found in the footnotes of the Mesarosh case:

"This extraordinary length of time"—they are talking about the old rules where they gave them sixty days after judgment, and in the event of an appeal at any time before disposition by the appellate court as time within which a motion for new trial based upon newly discovered evidence could be filed—and the Court had this to say:

> [fol. 34] "It is obvious, however, that this privilege might lend itself for use as a method of delaying enforcement of just sentences. Especially is this true where delay is extended by appeals lacking in merit.

This case well illustrates this possibility. While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial. It was wrong in the second instance when it did review the facts de novo and order the judgment set aside."

This is one of the so-called old cases, but the Supreme Court in the case which Mr. Witt relies upon cited it with approval. I think, your Honor, that there is nothing on the face of this motion nor in any statements made by counsel that would justify setting aside this conviction and the judgment of the Court in going through all of this another time.

Mr. Witt: I think I would probably save everybody's time if you gave me a few minutes to look over my notes and cut everything down.

The Court: We will have a fifteen minute recess.

(Recess taken.)

The Court: You may proceed, Mr. Witt.

FURTHER ARGUMENT BY MR. WITT

Mr. Witt: May it please the Court, I think it may be well to put to one side two or three quite irrelevant statements that Mr. Kelley made, first with respect to the so-called statement which Mr. Kelley filed this morning. He said that whether it satisfies me or not is of no concern to him. Well, it is not a question of satisfying me, your Honor, or satisfying Mr. Kelley; it is just a question of satisfying what the rules of law are, and all I can do is repeat what I tried to say earlier: As I understand the cases, and particularly the position of the Supreme Court with respect to the responsibility of the prosecution in a situation of this kind, I don't think the prosecution is taking

the correct position. I don't think it is going far enough with this so-called statement.

[fol. 35] Also, I think we can put to one side Mr. Kelley's statements about the two trials, the length of time that has been consumed, and the fact that there are other witnesses against Travis. That again is the kind of argument that prosecutors are in the habit of making when they are confronted with a problem of this kind, having to do with a fair trial, their position comes down to saying, "Well, this might have been unfair, maybe this man Gardner is a liar or psychopathic but let's forget it. Travis is guilty. It has taken a long time; let's go ahead."

That's not the way I read the Constitution or read the cases. Another matter that I would just like to touch on and pass, and that is Mr. Kelley's reference to what I understood was the Loughlin case, when he referred to Judge Pickett's opinion in this court. I doubt that if Mr. Kelley were on the other side of the issue he would seek to support that opinion of Judge Pickett's. Anyway, I am familiar with it. I am reasonably familiar with the cases under 1001, and I think Judge Pickett's opinion in that case states doubtful law; but, it is immaterial whether Judge Pickett in the Loughlin case was right or not, because the issue here as to whether or not Gardner violated 1001 in Butte when he gave the false statements to the FBI depends upon the answer to the second point that Mr. Kelley made, and that is whether the statements were material.

Mr. Kelley in passing touched on the question of jurisdiction under 1001. Well, there can't be any question but that the FBI had jurisdiction, and this matter of getting Gardner's statements about other people as well as about his own history was a matter within the jurisdiction of the FBI.

As to materiality, I don't think there can be any question about that either, because I should imagine Mr. Kelley would agree that when the FBI is talking to a person who may be a witness in one or more important cases the FBI is quite concerned with getting correct information for use in those cases, and the fact that the information secured from Gardner in Butte was used in the

Travis case in these 3500 statements is itself proof that everything contained in those statements was material, so I think 1001 was satisfied.

[fol. 36] Now, I just want to come to one other factual thing and then make two points. First, I want to answer what Mr. Kelley had to say about Gardner's testimony in the West case about his military service. I am not sure I followed Mr. Kelley; but, if I did follow him correctly I think I understood him to say that Gardner may have not understood the question or the question may have contained a double negative, and that in fact the reporter who took the answer on it, transcribed that, may have made a mistake; so in fact, even if a statement by Gardner on the witness stand that he had never seen military service was perjury, still that is no real proof that Gardner ever said any such thing. The trouble with that argument is that Mr. Kelley has overlooked entirely the fact that the statement furnished us by the FBI included a similar answer. This is again Defendant's Exhibit J for identification, and under the heading "military service" the answer is, "none," the same answer that the transcript shows that Gardner gave on the witness stand in West; so I think whatever Mr. Kelley had to say about that is beside the point. He overlooked this statement in the FBI report which we were furnished, so Mr. Kelley is wrong about that.

Now, in passing I want to take this opportunity to refer to a remark made in the Government's memorandum in the same connection. The Government argues in the memorandum that although Gardner gave this answer under cross examination in the West case he wasn't even asked the question on cross examination in the Travis case; that is, the question about his military service. Well, there is a simple answer to that, your Honor. We had this FBI statement to the effect that he had no military service, and there was therefore no reason for cross examining him about it. We didn't know at the time about his desertion, of course, and your Honor will have observed and will remember from the trial that I cross examined him only when I had a prior inconsistent statement of his, so I cross examined him about the year of his birth because

he had told Senator Watkins he had been born in 1907, when he told the FBI and he said on the witness stand here he was born in 1906, and in passing in that connection, the Army records show that he told the Army that it was 1903, so I asked him about that matter, relatively unimportant though it was, because I was trying to build up a record to show this man never makes consistent statements about any single fact in his history.

[fol. 37] In any event, that's why we didn't ask him, and if we didn't ask him, and if we didn't then if the Government thinks we should have asked him whether he had seen military service, the answer to that is that we were misled by Gardner's violation of 1001 when he told the FBI in Butte that he had seen no military service.

Now, in the same connection, Mr. Kelley, if I followed him, made an argument in confession and avoidance. He said that we referred to these several inaccuracies in this material relating to Gardner, but after all, you can't expect a man to keep accurate records about where he worked and where he lived. Well, that misstates and misreads what this case is about, if the Court please. Here we are dealing with a man who as I said a moment ago, and as the record shows, doesn't give consistent answers about when he was born. On one occasion it is 1903; on another occasion years later it is 1907, and then a few years later it becomes 1906, and I won't repeat everything else that I tried to develop this morning; the record shows that, and that we referred to in the motion indicating that whatever this man says has been subject to objective proof we have found that he is either lying or has made inconsistent statements, and we have a record now of about twenty or twenty-five such illustrations at least, aside from the possibility which I referred to already of a whole series of lies.

The important point about this argument of Mr. Kelley's, if the Court please, is that we are talking about a witness who gave testimony about two conversations, one which had taken place more than six years before, and one which had taken place more than four years before. He testified as to what he said to Travis and what Travis said to him in the fall of 1951. He testified as to what he said to Travis and what Travis said to him in June of 1953, and

I submit if Mr. Kelley admits that this man Gardner is mistaken about all these other items which are subject to objective proof, because a man can't be expected to remember such things, as for example, the year of his birth, and can't be expected to keep accurate records, as if people go around keeping records of their birth so that when they are asked they have to say, "Just let me check my records." I say if we are talking about that kind of a man then what kind of credence can we give testimony about what he said to Travis and what Travis said to him back in 1951 and 1953?

[fol. 38] Now, coming to two points as a matter of law, if the Court please: In the first place, Mr. Kelley says that what we are dealing with now on our representation is a collateral matter in a wholly unrelated case, meaning the alleged perjury, I take it, in the West case. No. 1, we are dealing with a crime which is much like perjury. It is often called perjury, the crime of violating 1001, and if there is any doubt as to whether what this man said on the witness stand in West was technical perjury, there can't be the slightest doubt that what this man told the FBI in Butte was technically a gross violation of Section 1001, and that was in this case, because what he told the FBI in Butte didn't remain in the FBI files in Butte. It was transcribed and given to the defense in this case for use in the defense of Travis pursuant to the new law, Section 3500, so we are not dealing with a collateral matter in a wholly unrelated case.

We are dealing with a question of a man who has lied over and over and over again in connection with this case, and in that connection the Government's memorandum says in our motion we don't point out where he may have committed perjury in this case. Well, just in passing we thought it was so obvious we didn't have to spell it out in the motion; but, again I remind your Honor and the prosecutors that this man said on the witness stand here that he was born in 1906, when the records of the Army show he was born in 1903. Now, it could be, and the reason we said in our motion he may have committed perjury, because it could be that he told the truth on the witness stand here when he said 1906 and that he lied when he

nlisted in the Army in 1922; but, we have no way of nowing that.

In any event, when he told Senator Watkins that he was orn in 1907 he was obviously lying there or lying when e enlisted in the Army, or lying on the witness stand ere; but, anyway, that's the reason why we say he may ave committed perjury in this case.

Now, finally coming to the Mesarosh and Johnson cases: 'irst, and again in passing, Mr. Kelley is mistaken when e advised the Court a few minutes ago that the Solicitor eneral in the Mesarosh case pointed out to the Supreme ourt the possibility of perjury in the Mesarosh case. Ir. Kelley is mistaken. Here is 352 U. S. at page 8 where ie Court refers to that problem. After summarizing what ie Supreme Court advised the Court about Mazzei's lies nd possible perjuries elsewhere, the Court goes on to say is at page 8:

> [fol. 39] "At the oral argument, however, the Solicitor General stated that although he believed all of this testimony to be untrue, he was not prepared to say the witness Mazzei was guilty of perjury in giving the testimony; that his untrue statements might have been caused by a psychiatric condition, and that such condition might have arisen subsequent to the time of this trial."

So the problem there was entirely different. The Solici- or General didn't know the answer, but at least the So- citor General did not take the position that there may ave been perjury by Mazzei in the Mesarosh case. All e did was point out that he had said these extraordinary nd flamboyant things elsewhere under oath and not under ath, and therefore the whole matter should be looked to.

But, be that as it may, getting to the real point of the esarosh case in terms of Mr. Kelley's presentation, to e, your Honor, in terms of what I call the old cases, ie most significant thing in the Mesarosh case, aside from s basic philosophy which I tried to express earlier, will found in footnote four on page nine, 352 U.S., the same

footnote Mr. Kelley referred to where the Court cites the Johnson case and the Rutkin case and several others, and I refer particularly to the last sentence of that footnote which appears on page ten after the Chief Justice cites the Johnson case and these other cases he says as follows:

> "But see United States v. On Lee, 201 F. 2d 722, 725-726 (dissenting opinion)."

And why do I say that I think that is perhaps the most significant thing in that opinion in relation to the motion which is presently before your Honor? That's because that dissenting opinion, the one in the On Lee case, as your Honor may recall, was a dissenting opinion in that famous narcotics case which went to the Supreme Court later, went to the Supreme Court earlier, and it came up again before the Circuit Court for the Second Circuit on a motion for new trial because of evidence of credibility, evidence relating to the credibility of the chief prosecution witness, and the issue in that case was much the same as the case before your Honor, although the circumstances were entirely different, and what Judge Frank did in his dissenting opinion in that case, as I read it, your Honor, the Supreme [fol. 40] Court adopted in the Communist Party and the Mesarosh cases, because Judge Frank argued that when you are dealing with a witness whose credibility has been completely destroyed or undermined, these old rules about being merely impeaching or cumulative, et cetera, et cetera, which Mr. Kelley referred to, become irrelevant, and I think the fact that the Chief Justice in that footnote uses the signal for that citation "But see" to my mind has very considerable significance aside from, as I have said, what I think the philosophy of the opinion itself is.

Finally, I think Mr. Kelley overlooked perhaps the most significant thing in the Johnson case in Mr. Justice Black's opinion. Mr. Kelley was concerned with convincing your Honor that since Travis was indicted in 1954 we should hurry along with this and get Travis in jail as soon as we can, and therefore read you that part of Mr. Justice Black's opinion dealing with delays and abuse of this pro-

cedure; but, actually the more important point in the case dealt with the basis on which a new trial should be ordered, and actually Mr. Justice Black was concerned in having appellate courts substitute their own judgment on disputed questions of fact on new trial motions for that of the district judges, and the sentence on top of page 111—this is 327 U.S.—makes that quite clear, and Mr. Justice Black makes the same point elsewhere, and I quote:

> "Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari."

The important thing in that sentence, your Honor, is Mr. Justice Black's reference to the findings on conflicting evidence, and that is exactly the situation you have in most all of the cases which deal with conflicting evidence either on affidavits or after hearing for the taking of evidence, and the cases set forth the rules, and customarily the trial courts are sustained in denying those motions where the evidence is conflicting.

In this case I submit, your Honor, as far as this man Gardner was concerned, as far as his credibility is concerned, we are not dealing with conflicting evidence. We may be if your Honor orders a hearing and we get him back [fol. 41] on the witness stand and we get the FBI agents and the Government attorneys on the witness stand and then we may be dealing with conflicting evidence; but, as this record stands now there is no controversy about these facts relating to the credibility of this man derived from this newly discovered evidence.

If I followed Mr. Kelley's argument correctly, if I didn't misread the Government's memorandum, it is an argument in confession and avoidance. It is an argument in confession and avoidance, because they can't possibly stand up here and say to this Court, "We are convinced this man is not a liar; we are convinced that this man has told the truth; we are convinced this man is worthy of credence."

As I said, as far as we can tell whenever we deal with anything which is subject to objective verification in the case of this man, he never tells the truth, and I submit that a conviction secured on the testimony of a man like that should not be permitted to stand.

(Pages 1-A through 21-A, inclusive, follow.)

Reporter's Certificate

I, Keith B. Watson, Official Court Reporter, do hereby certify that the foregoing pages, numbered 1 through 54, constitute a true, complete and correct transcript of my stenograph notes of the proceedings had in the foregoing case on October 31, 1958.

Keith B. Watson, Official Court Reporter.

(Argument by counsel for both sides was presented.)

STATEMENT BY THE COURT

The Court: Several days ago when this motion was set down for hearing by the Court, Mr. Witt and Mr. Deikman were kind enough to furnish the Court a list of the cases upon which they relied in support of their motion. In the intervening period the Court has examined all of these cases on the list submitted by counsel for defendant and has read with great care practically all of the cases that have been cited, and has itself made a memorandum relating to what each of these cases hold. So with this study that I have made already, which normally could not [fol. 42] have been done until after the arguments, I am satisfied in my own mind as to the disposition of this case or of this motion for a new trial and in the alternative for a hearing on the motion.

Now, I think the first thing that must be examined is exactly what the basis of the motion is. As I understand the motion as counsel have mentioned it here in the argument, the only inconsistency in Gardner's testimony in the trial of the Travis case here was that it said that he misstated his age. He testified in this trial, according to the

motion, that he was born in 1906, while the defense says that in a letter from Mr. Yeagley, acting Assistant Attorney General, dated October 8th, 1958, that the Army records show he was born on October 13, 1903; therefore, they say there is an inconsistency in that testimony.

Now, the only other thing that is said is that in the West case he denied—without quibbling about the form of the question—that he had been in military service. The defense says that this letter that I have just referred to shows that he was in the service of the United States, in the Army, and also goes on further to say that he was a deserter; and they said, of course, that if his answer had been that he had served in the armed forces, I presume the next question would have been about this desertion. In the West case, all it said he did by way of inconsistency in his testimony was to say that he denied he was in the military service, whereas the defense says in truth and in fact he was in the military service.

The only other thing pointed out as a basis for a new trial has to do with these FBI reports which were furnished to the defendant pursuant to Section 3500 of Title 18, which, of course, were not introduced in evidence, as I understand it, at this particular portion of the trial, but were furnished to the defense on their motion in connection with the Jencks case and Section 3500, and it said in that regard that the statements to the FBI were untrue in that therein he stated he was born on July the 13th, 1906, which was consistent with his testimony at the trial, and that he had no military service; that he had been employed by duPont Chemical of Niagara Falls, New York from 1925 to 1929, and that he resided in Niagara Falls, New York from 1925 to 1929. Now, they say that inferentially the information contained in the letter from the acting Assistant Attorney General would show that those statements were untrue, either in whole or in part, these statements made in the FBI report, which I repeat, were not involved in the evidence at the trial at all.

[fol. 43] The period of his employment, I might say, is only partially in issue, because under the submission that Mr. Witt made this morning, a portion of this period he testified to was covered; it is a fringe area before 1926

and after 1928, I think, that is involved. Be that as it may, those are the charges that are made in this motion for a new trial.

Now, this motion is unique in one respect, I think, from many I have observed personally or any I run across in any of the cases I have examined in that it is not supported by any affidavit at all; and by the same token, there is no counteraffidavit from the Government with respect to any of these matters herein contained. The Court could not possibly tell from the matter as it stands what the true date of birth of Mr. Gardner was: He said it was 1906 at the trial, and Mr. Yeagley says the military records show that it was 1903. Neither one of those statements possibly would establish what the ultimate fact was, or would be competent to do that. That is a matter that is not determined, cannot be determined on the face of these pleadings; but, of course, the defense is assuming that this letter of Mr. Yeagley does state the truth, and are saying therefore that these other statements are untrue.

Now, I am going to assume in my consideration of the motion that the defense is right in their contention that there was an inconsistency shown; I will assume that. It is not established as a fact. The motion on its face shows that there is an inconsistency between the date of Mr. Gardner's birth and with reference to his employment and with reference to his military service. Now, assuming again that the defense's contention in these matters is correct, we are confronted with the problem of whether that situation would bring this case within the purview of the tainted testimony rule that led to the dispositions in the Communist Party case and in the Mesarosh case that counsel have referred to a good many times in their arguments.

Now, in the Communist Party case I think it was conceded that the testimony of the witnesses involved, which was a matter of investigation, or not investigation, but which was the basis for the rehearing desired by the Communist Party before the Board, was perjurious in its nature. I think the Court stresses that, that there was no controversy about that. Now, in the Mesarosh case counsel here had some difference of opinion about exactly the

[fol. 44] scope or what the factual situation was in the Mesarosh case. In making my memorandum I have before me a copy of the transcript of the headnote prepared by the Supreme Court in that case, which says:

> "In a Federal District Court, petitioners were convicted of conspiring to violate the Smith Act by advocating the overthrow of the Government of the United States by force and violence. The Court of Appeals affirmed. While a review was pending in this Court, the Solicitor General moved that the case be remanded to the District Court for a determination as to the credibility of the testimony of one of the government witnesses at the trial. He stated that the Government believes that the testimony of this witness at the trial 'was entirely truthful and credible,' but that, on the basis of information in its possession, the Government now has serious reason to doubt the truthfulness of testimony given by the same witness in other proceedings. Parts of the testimony of this witness in other proceedings were positively established as untrue, and the Solicitor General stated on the argument that he believed other parts to be untrue. Petitioners moved that the case be remanded to the District Court for a new trial. Held: Solely on the basis of the Government's representations in its written motion and the statements of the Solicitor General during the argument on the motions, and without reaching any other issue, the Government's motion is denied, the judgment is reversed, and the case is remanded to the District Court with instructions to grant petitioners a new trial."

Now, a mere reading of what happened in the Mesarosh case goes a long way toward distinguishing that factual situation from what we are confronted with here in the case at bar. I think the same may be said of the Communist Party case. There we had a situation where the testimony of a witness was tainted with respect not only to collateral subjects, as we have here, but to the matter of the real issue, the material issue in the case, with respect to the guilt or innocence of the defendant. I will illus-

trate what I mean. If in this case the testimony challenged went to a material issue in the case, we would be confronted by an entirely different situation; but, here the challenged testimony is collateral to any issue in the case. It doesn't have any bearing whatsoever upon the question of the guilt or innocence of the defendant. It simply is a matter that under the law may be considered by the jury in determining what credibility to attach to the witness. [fol. 45] Now, I think the Chief Justice in this case, in the Mesarosh case, said what the rule is that must be applied here. This part of the opinion I think was read by Mr. Kelley a moment ago. In the opinion in the Mesarosh case the Chief Justice said:

> "It must be remembered that we are dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the granting of a new trial."

So here it seems to me that all we have, in effect, assuming for the purpose of this consideration the truth of the allegations about these specific matters that I have mentioned in the motion for new trial, is an attempt or is a showing of inconsistent statements that would go to the credibility of the witness by way of impeachment, and I think there are many cases; there were a number cited in the footnote, and I think the almost universal rule is that a motion for new trial upon the ground of newly discovered evidence cannot be granted on the basis of cumulative evidence or evidence that is merely impeaching in its character; and I think that is the nature of these alleged inconsistencies in the testimony of the witness Gardner.

Now, I have searched in vain through these cases cited by counsel for the defense for any case in which there was

a new trial granted for what amounted to collateral impeaching testimony. I could go down the line, but I don't think there is a necessity for it. In every one of them we had a situation where the testimony, the truthfulness—not of the witness, but the truthfulness of the testimony itself on a material issue relating to the guilt or innocence of the defendant was involved.

A very typical case that will illustrate what I am saying is a case which Mr. Witt mentioned in his argument, which is the latest decision of the Supreme Court on the matter, is Alcorta vs. Texas, in 355 U.S. at 28, which is not yet in a [fol. 46] bound volume; it is still on the Supreme Court advance sheets.

In that case under the laws of Texas they have a degree of homicide known as murder without malice, and the test roughly, without being too accurate possibly, is whether the homicide was committed in the heat of passion or violence. This man claimed that he came upon his wife, and the witness so testified at the trial, and this man kissing each other, and that he then killed his wife. As a result of that state of mind that he was in, excited and upset, he contended that he should have been convicted of murder without malice, and not first degree, as the jury found.

It developed that this witness later on retracted his statement and admitted—he testified at the trial he only had had a casual relationship with the wife. He afterwards retracted that testimony and admitted of an intimate relationship with the wife, admitted that they had been out together many times, and things of that sort. It also appeared that he had told the prosecutor of this before he testified at the trial, and the prosecutor had told him he needn't mention it unless he was asked directly the question about it, which didn't happen.

The court in that case, the Supreme Court of the United States in 355 U.S., said that he should have had a new trial, because this evidence, the untruthful evidence, not some collateral matter, related directly to the defense of the defendant. The Court said:

> "If Castilleja's relationship with petitioner's wife had been truthfully portrayed to the jury, it would have, apart from impeaching his credibility, tended to

corroborate petitioner's contention that he had found his wife embracing Castilleja. If petitioner's defense had been accepted by the jury, as it might well have been if Castineja had not been allowed to testify falsely, to the knowledge of the prosecutor, his offense would have been reduced to 'murder without malice' precluding the death penalty now imposed upon him."

If, for example, the witness had merely untruthfully stated his age or employment, or collateral matters of that sort, it is quite obvious that the new trial should not have been granted. It is further to be noted in this case, as I pointed out a moment ago, that the prosecutor knew this testimony at the time the witness testified, which was [fol. 47] an added factor; but, that case is illustrative of the rule I am talking about, and I can believe that if, for instance, in either the Communist Party case or Mesarosh vs. United States case, if the only thing that had been advanced to the Court as a basis for taking the action it did was that these particular witnesses had testified untruthfully as to their age, as to their places of employment, which had no bearing upon any issue, any material issue in the case, or with reference to military service, that we never even would have had an opinion of the Supreme Court on the subject.

Now, there are two other cases that counsel mentioned this morning supporting the view that the motion for new trial might be granted on what I have been calling for convenience collateral impeaching testimony. He mentioned the case of United States vs. Segelman; it is 83 F. Supp. at 890. Now, as I pointed out this morning, in that case I think a reading of the opinion will disclose that the reason a new trial was granted there was that under the circumstances existing at the time of the motion the facts were, as I understand, that in the initial trial the defense had tried to interrogate the witness about whether he had been convicted of perjury. The fact was he had been convicted in the trial court, but had an appeal pending, and the Court sustained the objection, and then after the conviction, before the motion for new trial, the appellate court had affirmed the conviction, and he stood

convicted of perjury, and he came in and asked for a new trial on that basis. The perjury, as far as it appears, was on a collateral subject, and to that extent it might to some degree support the contention of the defense in this case; but, when we go further in the case we find at least in the Court's opinion the reason the new trial was granted, since the witness had been convicted of perjury the Court concluded that the trial court had the duty to instruct the jury that the testimony of such witness must be scrutinized with the greatest of care.

There was some discussion, as counsel know if they read the case, about whether the laws of Pennsylvania or the Federal Rule applied; but, that was the Court's conclusion, and, of course, short of a conviction for something, in this very case if a new trial was had, all the Court could give with respect to the testimony of the witness Gardner would be the ordinary instruction on credibility, which was given in the trial recently completed, so I think that does not support that general proposition.

[fol. 48] The other case that counsel mentioned this morning is United States vs. Senft. In that case a man had been convicted, the defendant had been convicted of the crime of bribing a man named Daly, who was an officer of the United States, and after the completion of the trial and before sentence was imposed Daly was indicted and convicted on the charge of extortion, and the defendant moved for a new trial on this basis, and the new trial was granted. The Court said in the opinion:

> "This presents squarely the question whether the court should grant the motion on the ground that no defendant should be convicted largely upon the testimony of a man who had then actually committed the very crime (even though it could not have been proved at the trial) which it was claimed he had committed in the case at bar, for Senft testified that Daly had tried to extort money from him shortly after he placed him under arrest.
>
> "Without Daly's testimony, or with him at the trial as a witness discredited by his conviction, it may be well doubted whether the jury would find a verdict of guilty."

Now, this statement to me clearly distinguishes the factual situation from that attending at the case at bar. There the defendant had been convicted largely on the testimony of a man who had actually committed the very crime of which the defendant was found guilty, and which the defendant claimed the witness had committed in the case which had been tried, and the situation here, of course, does not parallel that.

I think I could continue with those cases, but I am satisfied from my study of all the cases that the rule I have stated is correct and that this testimony here, judged by the motion itself, admitting for the purposes of this determination as the truth, amounts to no more than impeaching testimony, and under the pronouncement of the Supreme Court in the Mesarosh case itself could not form the basis for the granting of a motion for a new trial.

Now, of course, with that disposed of on the face of the motion there can be no basis for any hearing, because the hearing would have to naturally be limited to the specific charges of untruthful statements made during the trial or in this other case some of the authorities have, I think Mesarosh and the Communist Party both do recognize that [fol. 49] considerations may be given to testimony in other cases, but there is no purpose, it seems to me, on the face of the thing for any hearing, and, of course, there is no basis whatsoever, there being nothing shown by the motion to place the testimony in the tainted class denounced in the Mesarosh case and the Communist Party case that would require the Government to make any statement with respect to whether they knew the fact or whether they didn't, because I don't think the testimony comes in that category.

Ruling of the Court

My conclusion is—as is evident from what I have said—that the motion for new trial, or in the alternative for hearing on the motion, will both be denied, and the Government may draw an appropriate order.

COLLOQUY

Mr. Witt: Will your Honor bear with me for half a moment?

The Court: Yes.

Mr. Witt: I didn't realize your Honor might pass on the motion this afternoon from the bench; but, I would like to make this suggestion to your Honor. I made a check day before yesterday while I was still in the office as to the status of the new trial motion under Rule 33 in the West case. Perhaps Mr. Kelley knows more than I do, but I was informed by one of the attorneys for the defense that the District Court in Ohio had not yet acted on that.

The Court: That would make no difference in the Court's conclusion here at all.

Mr. Witt: May I make my point, if the Court please?

The Court: Yes, I thought you were just informing me—

Mr. Witt: I am not suggesting that your Honor see what the District Court in Ohio does, but we may be faced with this problem: It may well be that the District Court in Ohio will grant that motion on the face of it, or may order a hearing and then grant the motion after a hearing. If that comes about we will have a new situation here perhaps—

The Court: I don't think so. I am giving my decision [fol. 50] on the motion independent of that motion, and I can't think of anything that would happen in that connection that would change my views on this motion.

Mr. Witt: I don't care to argue any further, but I was about to say, as I read the rules if we think something would happen there that would affect this case it is open to us to come in with a new motion under Rule 33.

The Court: I don't know; I wouldn't want to pass on that.

Mr. Witt: I am not asking your Honor to pass on it. All I wanted to do was try to get my point across to your Honor, if I could, and that was to suggest that your Honor perhaps not decide this motion until they see where they stand in the West case, so that we won't have to be coming in here perhaps with another motion.

The Court: Perhaps the same argument might be made in the West case, that they wait until this motion is decided. The order can be made right today, and, of course, if Mr. Witt has a right to make another motion under the rules he may do that; but, as far as this order is concerned, you may draw that now, Mr. Kelley.

Mr. Witt: One other point, for the sake of the record. In view of the fact that your Honor made reference to the circumstance that no supporting affidavit was filed with this motion, I want to point out, as I think I pointed out in chambers when we had an informal conference after the motion was filed, that there seemed to be nothing in the motion that called for an affidavit from counsel or from anybody else, because the facts were not in dispute; the basic fact situation derived from a letter from an acting Assistant Attorney General, and as I read—I think it is Rule 47, I am not sure—affidavits in support of a motion of this kind aren't required, although I, of course, agree that they are filed in most cases.

The Court: As the Court tried to make very clear in announcing its views on the motion, I have proceeded on the assumption that the statements you make about this inconsistent testimony, both here and in the West case, with respect to Gardner's residence, his age, and these matters of employment, was as you stated in your motion. I have assumed that.

[fol. 51] Mr. Witt: Thank you, sir.

The Court: The reason I commented on the affidavit matter, the lack of affidavit, was because—as I think you would be the first to concede—no one could say on the face of this record now which record is true.

Mr. Witt: I commented on that this morning.

The Court: I commented on that because in these other cases, practically all of them, affidavits were filed, and, of course, the thing I didn't mention that you also are well aware of, that in connection with the cases I have mentioned and a number of others cited, we had a number of cases in which there had been a retraction and a recantation of evidence by some witness, which naturally would present an entirely different situation here, because there the Court would be confronted with determining whether

the retraction was correct or the original testimony was correct, as you know.

Mr. Witt: Thank you very much, sir.

If the Court please, we ask that the two letters that I referred to in my argument, the one from duPont, Niagara Falls, and the other from the Morrisania hospital, be filed and made part of the record on the motion for new trial under Rule 33.

The Court: On the basis of my recollection I think I said at the time that this duPont letter might be filed and placed in the record, and, of course, incorporated in the record on this motion.

Now, I see no objection to treating the other one the same way. I think I commented when it was offered or when it was mentioned that I thought it went beyond the scope of the motion, but I see no objection to allowing it to be filed and incorporated in the motion. Do you have any objection?

Mr. Kelley: No, I think the two exhibits or papers and the statement of the Government should all be part of the file.

The Court: I think they are all in the same category, and I think I said it could be filed. In fact, I think I handed it to the Clerk, so you can mark it "filed" and keep it in the record.

[fol. 52] Mr. Witt: I wonder how you will be referring to them for purposes of appeal. Should they be called exhibits to the motion?

The Court: I think you should refer to them as what they are.

(Proceedings adjourned.)

Filed Dec. 5, 1958.

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 53] CAPTION

Pleas and proceedings in the United States Court of Appeals for the Tenth Circuit at the January Term and March Term, 1959, of said court.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Alfred P. Murrah and Honorable David T. Lewis, Circuit Judges.

On the 17th day of December, A. D. 1958, a transcript of the record, pursuant to a notice of appeal, filed in the United States District Court for the District of Colorado, was filed in the office of the clerk of the United States Court of Appeals for the Tenth Circuit, in a certain cause wherein Maurice E. Travis was appellant, and United States of America was appellee, which said transcript, as prepared and reproduced under the rules of the United States Court of Appeals for the Tenth Circuit, is in the words and figures following:

[fol. 54] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

MOTION TO REMAND CASE TO THE DISTRICT COURT, OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME FOR FILING BRIEF —Filed January 13, 1959

Appellant, by his attorney, moves that the case be remanded to the District Court, or, in the alternative, that the time for filing appellant's brief be extended to February 20, 1959. In support thereof, appellant shows:

1. This is an appeal from an order of the District Court for the District of Colorado denying a motion, under Rule 33 of the Federal Rules of Criminal Procedure, for a new trial, or, in the alternative, for a hearing, based on newly discovered evidence. Appellant's brief is required to be filed on or before January 22, 1959.

2. The appeal from the conviction herein (No. 5879) is pending decision by this Court, after argument on November 17, 1958.

3. The newly discovered evidence on which the motion for a new trial was based consists of evidence that Fred L. Gardner, one of the three prosecution witnesses, had deserted from the Armed Forces in 1926; had lied about that and other matters in giving information to the F.B.I., which in turn was furnished to appellant, pursuant to Title 18, U.S.C., Section 3500, on the trial herein; and had committed perjury in his testimony on the trial herein and on the trial in *U.S. v. West et al.* in the United States District Court for the Northern District of Ohio, Eastern Division, Criminal No. 22230.

4. A hearing on a motion for a new trial in the *West case* on similar grounds as the motion herein was conducted by said District Court from December 15 to December 18, 1958, and ruling thereon is pending. The stenographic record of said hearing has not yet been transcribed, but the undersigned attorney for appellant [fol. 55] has been advised by the attorneys for defendants in the *West case* that the evidence received in the course of said hearing proves that Gardner lied to the F.B.I. and perjured himself on the trial herein and on the trial in the *West case* with respect to matters in addition to those set forth in the motion for a new trial herein. Appellant desires to bring such additional matters to the attention of the District Court for reconsideration of the motion for a new trial and then to have them incorporated in the record on this appeal in the event that the District Court reaffirms the denial of the motion.

5. Without a copy of the typewritten transcript of the proceedings on the hearing in the *West case*, appellant is in no position to take further steps in the District Court. The attorney for appellant has given the Official Court Reporter in the United States District Court for the Northern District of Ohio an order for a copy of said transcript, but the Reporter advises that, because of the press of other matters in said District Court, said transcript will not be available until some time in February, 1959. As soon as possible after said transcript is available to attorney for the appellant and if this Court remands the

case to the District Court, appellant will move the District Court for a reconsideration of the order denying the motion for a new trial.

6. Unless this Court remands the case, it will be necessary for appellant to file a second motion for a new trial, with the result that there will be two separate appeals on two separate records if the District Court also denies the second motion. A remand of the case will avoid additional expense to the parties and will make it more convenient for this Court to consider the entire matter more expeditiously on one record on one appeal instead of on two [fol. 56] records on two appeals. On the other hand, if, upon reconsideration, the District Court grants the motion for a new trial, it will be unnecessary for this Court to decide even the instant appeal.

7. In the event that this Court denies the foregoing motion to remand, appellant moves that the time for filing his brief be extended to February 20, 1959. Appellant's attorney is leaving his office in New York City on January 13, 1959, for a trip to several cities in the West on necessary personal and professional engagements and will not return to his office until early in the week of February 9. An extension of time for filing the brief to February 20 will not delay the eventual disposition of the entire matter since, if this Court denies the motion to remand, appellant will, as set forth above, file a second motion for a new trial.

Wherefore, appellant moves that the Court remand the case to the District Court, or, in the alternative, that the time for filing appellant's brief be extended to February 20, 1959.

Respectfully submitted,

Nathan Witt, Post Office Box 150, New York 23, New York, Attorney for Appellant.

[fol. 57]

IN UNITED STATES COURT OF APPEALS

ORDER DENYING MOTION TO REMAND AND GRANTING MOTION TO EXTEND TIME FOR FILING APPELLANT'S BRIEF —January 13th, 1959

Before Honorable Sam G. Bratton, Chief Judge.

This cause came on to be heard on the motion of appellant to remand this cause to the United States District Court for the District of Colorado, or, in the alternative, for an extension of time for filing appellant's brief.

On consideration whereof, it is now here ordered that the said motion to remand be and the same is hereby denied.

It is further ordered that the time for the serving and filing of appellant's brief be and the same is hereby extended to and including February 10, 1959.

[fol. 58] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—March 26, 1959 (omitted in printing).

[fol. 59]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—March 27, 1959

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Alfred P. Murrah and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed, without written opinion.

[fol. 60] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 61]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1958

MAURICE E. TRAVIS, Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—April 4, 1959

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 26th, 1959.

Charles E. Whittaker, Associate Justice of the Supreme Court of the United States.

Dated this 4th day of April, 1959.

[fol. 62]

SUPREME COURT OF THE UNITED STATES

No. 75, October Term, 1959

MAURICE E. TRAVIS, Petitioner,

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—May 31, 1960.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with Nos. 479 and 872 and a total of three hours is allowed for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted] 53

MAURICE E. TRAVIS,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

NATHAN WITT,
P. O. Box 156,
New York 23, N. Y.,
Attorney for Petitioner.

SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1958

No.

MAURICE E. TRAVIS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit, entered March 27, 1959.

Opinion Below

The oral opinion of the District Court for the District of Colorado is unreported, but appears in the record (R. 41).[1] The Court of Appeals affirmed the judgment of the District Court, without opinion.

Jurisdiction

The judgment of the Court of Appeals was made and entered on March 27, 1959 and appears in the Appendix to this Petition. On April 6, 1959, Mr. Justice Whittaker extended the time for filing a petition for writ of certiorari to and including May 26, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

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[1] In addition to the certified record, nine copies of the record in the court below have been filed with this petition.

Questions Presented

1. Whether a defendant, after conviction under 18 U. S. C. 1001, is entitled to a new trial under Rule 33 of the Federal Rules of Criminal Procedure on the basis of newly discovered evidence that one of the three prosecution witnesses had committed perjury in another criminal case in a Federal District Court a short time before and had given false information about himself to the F.B.I. which was subsequently furnished to defendant on the trial pursuant to the so-called "Jencks statute", 18 U. S. C. (Supp. V) 3500.

2. Whether the District Court abused its discretion in denying petitioner a hearing on the motion for a new trial.

Statutes Involved

18 U. S. C. 1001, 62 Stat. 749, provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both."

29 U. S. C. 159(h), 61 Stat. 143, 146, provides:

> "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously

> or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional method. The provisions of sections 286, 287, 1001, 1022 and 1023 of Title 18 shall be applicable in respect to such affidavit."

Insofar as relevant, Rule 33 of the Federal Rules of Criminal Procedure provides:

> "The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. * * *."

Statement of the Case

Petitioner had been convicted on February 5, 1958 on the four counts of an indictment charging him with violating 18 U. S. C. 1001 for filing false affidavits under Section 9(h) of the Taft-Hartley Act, 29 U. S. C. 159(h). Petitioner was convicted for denying in his affidavits in 1951 and 1952 that he was a member of, or affiliated with, the Communist Party. He was sentenced to imprisonment for eight years and fined $8,000. His appeal from the conviction is still pending in the Court of Appeals (No. 5879), having been argued on November 17, 1958 (R. 10-11).

On the trial under the indictment, one Fred Leonard Gardner was one of the three prosecution witnesses against petitioner. The allegation in the motion for a new trial that Gardner's testimony was essential to support the judg-

ment of conviction on each of the four counts (R. 2) was not disputed in the courts below by the government.

In January, 1958, two weeks before he testified against petitioner, Gardner had testified for the prosecution on the trial in *United States* v. *West, et al.* in the United States District Court for the Northern District of Ohio, Eastern Division (No. 22230), a case in which the defendants were charged under 18 U. S. C. 371 for conspiring to file false affidavits under Section 9(h) of Taft-Hartley (R. 2).

On October 16, 1958, the defendants in the *West* case filed a motion for a new trial under Rule 33 based on newly discovered evidence that Gardner's testimony on the trial in that case that he had never been in the Armed Forces was false in that he had been in the Army in the 1920's and had deserted in 1926 (R. 3).

Petitioner's motion for a new trial or, in the alternative, for a hearing on the motion (R. 2), was filed on October 17, 1958 and, after alleging the above facts, alleged that the newly discovered evidence relating to Gardner's Army record also showed that Gardner had given false information to the F. B. I., later furnished to petitioner on the trial under 18 U. S. C. 3500, about his lack of military service and his desertion, about his age, and about his employment and his places of residence during the period from 1925 to 1929 (R. 4). In the course of the argument on the motion in the District Court, the motion was supplemented by allegations that Gardner had also lied to the F. B. I. about his employment and his places of residence in the early 1930's (R. 8-9, 14-18).

On the argument in the District Court, apparently in answer to the allegation in the motion that it was the duty of the government to disclose whether any agents or attorneys of the Department of Justice had had knowledge of Gardner's perjury and false statements (R. 5), the prosecutor submitted a written "statement" denying any such knowledge (R. 7).

Insofar as Gardner gave false information to the F. B. I., he may himself have been guilty of violating the false statement statute, under which petitioner was charged and convicted (R. 4).

The newly discovered evidence about Gardner must also be evaluated in the light of the nature of his testimony against petitioner on the trial.[2] Gardner testified about two conversations he had had with petitioner, the first more than six years earlier and the other more than four and a half years earlier. The first conversation, in the fall of 1951, purported to show, by petitioner's own statements to Gardner, that petitioner's public resignation from the Communist Party in August, 1949, was insincere and that he still regarded himself as a member of the Party. The second conversation, in June, 1953, purported to show that petitioner was familiar with the inner-Party activities of his union associates in Idaho and that he had Party relationships with them.

Thus, Gardner's testimony against petitioner, given in January, 1958, related to extrajudicial oral admissions made long before the testimony was given and suffers from the inherent weakness of such evidence.

The new evidence about Gardner's unreliability must also be viewed in the light of his inability or unwillingness to give accurate or truthful answers about minor or routine matters in his life, as revealed by his testimony under cross-examination on petitioner's trial. Thus, he testified that he was born in 1906, but admitted that he had sworn before a Senate Subcommittee in 1952 that he had been

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[2] The matters relating to Gardner's testimony on the trial appear in the record on the appeal from the conviction. Inasmuch as the Court of Appeals affirmed the denial of the motion for a new trial while the main appeal was pending before it—as it still is—these matters are not contained in the record on this appeal. In this connection, the Court is referred to the suggestion, *infra*, p. 12, that the Court hold this petition in abeyance pending the decision of the Court of Appeals in that case.

born in 1907. (The newly discovered evidence indicates that when he originally enlisted in the Army, he said he was born in 1903). He thought he had testified in the *West* case the week before he was being cross-examined, but it was actually two weeks before. He testified that his schooling went to about the second grade, but he had told the F. B. I. that he had had about seven years of elementary education. His testimony before the Senate Subcommittee, in the *West* case, on the trial against petitioner, and the information he gave the F. B. I. about himself are also full of inconsistencies with respect to the dates and the nature of his different jobs during the period from 1930 to 1951.

Following the argument on the motion for a new trial, the District Court rendered an oral opinion, denying the motion and the alternative motion for a hearing (R. 41). The appropriate order was entered on November 3, 1958 (R. 10).

In the *West* case, although the District Court denied the motion for a new trial, it first conducted a hearing, lasting three and a half days. 170 F. Supp. 200, 205.

REASONS FOR GRANTING THE WRIT

I. The decision below, affirming the denial of the motion for a new trial, is in conflict with applicable decisions of this Court.

In *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, and *Mesarosh* v. *United States*, 352 U. S. 1, this Court considered the effect of new evidence relating to the unreliability or untrustworthiness of prosecution witnesses in so-called Communist cases. In the *Communist Party* case, upon allegations that three witnesses had committed perjury in other cases, the Court remanded the case to the Board for a hearing on their credibility.

In *Mesarosh*, upon motion of the Solicitor General that the case be remanded to the trial court for further proceedings because of untruthful testimony given before other tribunals by Mazzei, a government witness, this Court remanded for a new trial.

The *Communist Party* and *Mesarosh* cases required that the District Court grant petitioner a new trial. In its opinion denying the motion, the District Court incorrectly limited the decisions.

For purposes of its decision, the District Court assumed the correctness of the facts as alleged in the motion. However, the Court distinguished the case from the *Communist Party* and *Mesarosh* cases on the ground that the "taint" affected Gardner's testimony on a collateral matter—his credibility—rather than his testimony on material issues. (The same distinction was drawn by the District Judge in the *West* case in his opinion denying the motion for a new trial. 170 F. Supp. 200, 211.)

It is true that this case differs from the *Communist Party* and *Mesarosh* cases in this respect. However, "fastidious regard for the honor of the administration of justice" in the federal courts, *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 124, would seem to require the application of the *Communist Party* and *Mesarosh* decisions to this case. Although the distinction between testimony relating to material issues and that relating to collateral issues is of course real, how far the distinction may be pressed and whether it is applicable at all depends upon the circumstances and the nature of the problem.

Suppose, for example, that it were shown that Gardner had *never* told the truth, or had *never* given consistent information, with respect to *any* routine circumstance in his history—when and where he was born; when and where he went to school; when and where he was married and

divorced; when, where, and for whom he had worked; when and where he had resided; and when he did military service, if at all. Would a jury believe such a man about two conversations with petitioner, one more than six years, the other more than four and a half years, before?

True, petitioner's showing was not this extensive. But enough was shown on the motion, especially when viewed in the light of the inconsistencies in Gardner's testimony about similar matters on the trial, to raise serious questions about his ability or willingness to tell the truth at all. In fact, the evidence is strong enough to raise doubts about Gardner's psychological stability similar to those expressed by the Solicitor General in the case of Mazzei. Gardner's instability may not be as apparent as Mazzei's. But a man who, over the years, has given inconsistent answers about his age, his schooling, his jobs, and his residences is not merely just another liar or just another man with a wavering memory. The problem would seem to be more deeply rooted.

Aside from the fact that the Trial Court's decision seems to be in conflict with two District Court cases which antedate the *Communist Party* and *Mesarosh* cases, *United States* v. *Senft*, 274 F. 62 (D. C. E. D. N. Y.) and *United States* v. *Segelman*, 83 F. Supp. 890 (D. C. W. D. Pa.), there are two respects in which this case is stronger than either the *Communist Party* or *Mesarosh* cases.

The first is that Gardner's falsehoods were committed in *this* case. The false information he gave the F.B.I. about his military service, his age, his employment, and his residences was, in turn, given to petitioner in the statements furnished pursuant to the "Jencks statute". Since, basically, the question about the newly discovered evidence is the effect it would have had on the jury if it had had the evidence before it in evaluating Gardner's credibility, it would seem that evidence that he lied in *this* case would have had a greater impact on the jury than evidence that

he lied in a different case. The fact that the evidence in this case relates to a so-called collateral issue, credibility, while the evidence in the *Communist Party* and *Mesarosh* cases went to the material issues, is an artificial distinction because, in any event, the evidence still bears on the collateral issue.

The fact that Gardner, by lying to the F.B.I., may have violated the very statute under which petitioner was charged and convicted, lends peculiar thrust to the new evidence. The jury would have been understandably hesitant to convict petitioner of lying to a federal agency on evidence given by a man who himself was shown to have lied to another federal agency and who, in addition, had uttered one of the same lies under oath only two weeks earlier in another federal court.

The second element which makes this case stronger than the *Communist Party* and *Mesarosh* cases is that what was concealed by one of Gardner's lies in this case and by his perjury in the *West* case was a desertion from the Army. In a Communist case, with its overtones of disloyalty, it is difficult to conceive of evidence more likely to discredit a prosecution witness with the jury than evidence such as this. In these times, every prosecution witness in a Communist case is a patriot, even a hero. The evidence of Gardner's desertion from the Army would have served to unmask the patriot and to reveal the scoundrel. Any normal jury would have been disenchanted to learn that the desertion in 1926 and the falsehoods in 1958 spanned this man's entire mature life.

If "the doing of justice" is to "be made so manifest that only irrational or perverse claims of its disregard can be asserted", *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124, petitioner should have a new trial.

II. The decision below, affirming the denial of the alternative motion for a hearing, is in conflict with applicable decisions of this Court.

Even if petitioner was not entitled to a new trial without a hearing, he should not have been denied a new trial in the absence of one. The denial of a hearing is in conflict with the *Communist Party* and *Mesarosh* cases and with *Remmer* v. *United States*, 347 U. S. 227.

This Court remanded the *Communist Party* case to the Board for a hearing. In *Mesarosh*, where the Court remanded for a new trial, the dissenting Justices, in two separate opinions, argued only that there should have been a hearing as to the truthfulness and credibility of Mazzei; not a new trial. The cases in this Court, then, seem to require that the District Court should have ordered a hearing on the motion for a new trial.

It is difficult to understand why the government took a hearing on the motion for a new trial in the *West* case as a matter of course,[3] but opposed a hearing in this case. In its brief below (pp. 1-2), the only argument made by the government in justification of its contradictory positions was that Gardner had been asked about his military service on cross-examination in the *West* case, but not in this case. Aside from the fact that petitioner's attorneys, on the trial, had no reason to doubt the information in the F.B.I. report that Gardner had not had any military service and thus had no incentive to inquire into the matter, it is not easy to see how this circumstance bears on the propriety of a hearing. Even on the merits of the respective motions, it would be difficult enough to understand an argument that Gardner's violation of the perjury statute in the *West* case was somehow more serious than his violation of the false statement

[3] Attorneys for the *West* defendants have advised petitioner's attorney to this effect. There was no dispute about the matter in the courts below.

statute in this case. But it is altogether impossible to comprehend how this difference would justify a hearing in the *West* case but not in this. In one sense, the responsibility of the prosecution in this case was heavier than in the *West* case. In the *West* case, the defense was not furnished with the false data which Gardner had given to the F.B.I. Gardner's falsehood was uttered on the witness stand. In this case, the prosecution, however unwittingly, was the belt for the transmission of Gardner's falsehoods.

In any event, the District Court denied a hearing on the ground that a hearing could not serve to bring the motion, on the merits, within the *Communist Party* and *Mesarosh* cases (R. 48-49). However, this view ignored the allegation in the motion for a new trial that the newly discovered evidence also gave rise to the belief that Gardner must have lied about many other matters on many other occasions since his desertion from the Army in 1926 (R. 5). It also ignored the allegation in the motion that it was the duty of the government to advise the Court and petitioner whether any agents of the Department of Justice had had knowledge of Gardner's desertion and of his falsehoods (*ibid.*). A hearing would have served to explore both areas.

It must of course be conceded that most motions for a new trial can be, and are, decided without hearing and that the discretion of the trial court in this respect is indeed a wide one. But where, as here, there were matters which a hearing could reasonably be expected to develop, cf. *Remmer* v. *United States*, 347 U. S. 227, it was an abuse of discretion for the District Court to deny a hearing.

Conclusion

For the foregoing reasons, this petition should be granted.

However, petitioner respectfully suggests that the Court defer action on the petition pending a decision by the Court of Appeals on the appeal from the conviction, *Travis* v. *United States,* No. 5879. If the judgment of conviction is reversed by the Court of Appeals and the government does not file a petition for writ of certiorari, this petition would become moot. If, however, the judgment of conviction is affirmed, petitioner would in normal course file a petition for writ of certiorari in that case also. Especially since this petition by necessity refers to certain matters in the record in the main case but not in the record in this case, it would seem appropriate for the Court to defer action on this petition until the Court of Appeals decides the main case.

The Solicitor General has advised petitioner's attorney that the government will interpose no objection to the foregoing suggestion.

The Court may also wish to consider two additional circumstances which bear on this suggestion. The first is that, on April 29, 1959, petitioner filed in the District Court a second motion for a new trial under Rule 33, based on newly discovered evidence contained in Gardner's testimony on the hearing on the motion for a new trial in the *West* case. Petitioner's attorney has been notified by the Clerk of the District Court that argument on the motion will probably not be heard until July, 1959.

The second circumstance concerns the status of the *West* case. Petitioner's attorney has been advised by the attorneys for the defendants in that case that the appeal from the denial of the motion for a new trial has been consolidated with the appeal from the judgment of conviction

and is pending in the Court of Appeals for the Sixth Circuit, Nos. 13,672-13,678, and that the time for appellants to file briefs has been extended to 30 days after this Court decides the cases pending before it relating to the "Jencks statute" and to the production of grand jury testimony,[4] or until 30 days after the end of this Term of the Court, whichever is sooner.

This Court, then, may wish to defer action on this petition until all three of the foregoing matters are determined by the lower courts.

Respectfully submitted,

NATHAN WITT,
P. O. Box 156,
New York 23, N. Y.,
Attorney for Petitioner.

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[4] *Lev, Wool and Rubin* v. *United States*, Nos. 435-437; *Rosenberg* v. *United States*, No. 451; *Palermo* v. *United States*, No. 471; *Pittsburgh Plate Glass Co.* v. *United States*, No. 489; *Galex Mirror Co.* v. *United States*, No. 491.

Incidentally, petitioner's appeal from his conviction also raises issues, among others, relating to the "Jencks statute" and the refusal of the District Court to order the production of the grand jury testimony of Gardner and the other two prosecution witnesses.

APPENDIX

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 6060

MAURICE E. TRAVIS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Fifth Day, March Term, Friday, March 27th, 1959.

Before Honorable Sam G. Bratton, Chief Judge and Honorable Alfred P. Murrah and Honorable David T. Lewis, Circuit Judges.

This cause came to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed, without written opinion.

No. [redacted] 283

In the Supreme Court of the United States

OCTOBER TERM, 1958

MAURICE E. TRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
J. WALTER YEAGLEY,
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PHILIP R. MONAHAN,
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No. 945

MAURICE E. TRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the District Court (R. 41–51) is not reported. The Court of Appeals affirmed the judgment of the District Court without written opinion (Pet. 15).

JURISDICTION

The judgment of the Court of Appeals (Pet. 15) was entered on March 27, 1959. By order of Mr. Justice Whittaker, the time for filing a petition for a writ of certiorari was extended to May 26, 1959. The petition was filed on May 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the trial court properly denied without a hearing a motion for a new trial on the basis of past misrepresentations and alleged misrepresentations by a government witness concerning details of his personal history, none of which was material to the issues of the trial.

RULE INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure is set forth at page 3 of the Petition.

STATEMENT

The petitioner had been convicted of filing false non-Communist affidavits with the National Labor Relations Board, in violation of 18 U.S.C. 1001 and Section 9(h) of the National Labor Relations Act (29 U.S.C. 159(h)).[1]

At the petitioner's trial—his second under the same indictment[2]—one Fred Gardner, whose testimony is the subject of the motion for a new trial, appeared as one of three government witnesses and testified on direct examination concerning two conversations he had had with petitioner in 1951 and

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[1] The petitioner was convicted on four counts of a six-count indictment, and was sentenced to a total of eight years' imprisonment and $4,000 in fines (R. 10–11). An appeal from this conviction is now pending in the Court of Appeals for the Tenth Circuit.

[2] A prior conviction on the same four counts was reversed and a new trial ordered because of error in permitting an improper question to be put to a character witness on cross-examination (*Travis* v. *United States*, 247 F. 2d 130 (C.A. 10)).

1953 (R. 2, 23–24, 37).[3] He testified that, in a conversation with the petitioner in the fall of 1951, the latter confided to him that his formal resignation from the Communist Party in 1949 was not an actual resignation and that he (petitioner) was still a member of the Communist Party. The substance of the second conversation, had in June 1953, tended to prove that the petitioner was still a member of the Communist Party at that time.[4] The significance of Mr. Gardner's testimony to the trial issues lay in the fact that it tended to prove that the petitioner's pre-1949 membership in the Party—which was undisputed—was not terminated by his public statement in 1949 stating that he had "resigned", but continued, uninterrupted, beyond that date to and beyond the dates of both the affidavits in issue (see footnote 4). One of the two other government witnesses similarly testified to conversations with the petitioner which tended to prove that the petitioner was still a member of the Party in 1952 and 1953—between and after the affidavit dates. No evidence was offered by the petitioner at either of his two trials contradicting the Government's proof that he was a Party member at the time he signed the two affidavits (R. 28).

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[3] Mr. Gardner was a former member of the Communist Party and a former international representative of the union of which the petitioner was an officer—the International Union of Mine, Mill and Smelter Workers. He did not appear as a witness at petitioner's first trial.

[4] The allegedly false affidavits, two in number, on which the charges of the indictment were based, were filed in December 1951 and December 1952, respectively (R. 10–11).

A few days before Mr. Gardner testified against the petitioner, he had appeared as a government witness in *United States* v. *West, et al.*, a prosecution in the United States District Court for the Northern District of Ohio, for conspiracy to file false non-Communist affidavits, in violation of 18 U.S.C. 371 (R. 2). Mr. Gardner's testimony on direct examination in the *West* case concerned other experiences he had had in the Communist Party, relating to the defendants in that case. On cross-examination in the *West* case, Mr. Gardner was asked whether he had ever been in the armed forces and he answered "No" (R. 3, 29). As a result of information received by one of the attorneys for the defense in the *West* case, indicating that this testimony by Mr. Gardner concerning his military service history was untruthful or inaccurate, the attorneys for the defendants therein communicated with the Department of Justice requesting that it investigate the matter (R. 3). See *United States* v. *West,* 170 F. Supp. 200, 206–207 (N.D. Ohio). They were advised in a letter dated October 8, 1958, from the Acting Assistant Attorney General, Internal Security Division, that, upon investigation, Army service records revealed that Mr. Gardner served in the Army from January 25, 1922, to May 30, 1925; that he was absent without leave for a short time during this period, as a result of which he had been tried by court-martial and sentenced to two months' confinement at hard labor and to forfeit $20.00 per month in salary for that period; and that he had re-enlisted in the Army on January 21, 1926, and

was assigned to Fort Riley, Kansas, but deserted from there on May 11, 1926, and never returned (R. 3). The Army records further reflected, the letter stated, that Mr. Gardner had given December 13, 1903, as his date of birth,[5] and that he was not, at the time of the inquiry, wanted by the Army as a deserter (*ibid.*). See also *United States* v. *West, supra,* 170 F. Supp. at 205. Thereafter, on October 16, 1958, the *West* defendants moved under Rule 33, F.R. Crim. P., for a new trial, relying on this newly discovered evidence (R. 3). After a full hearing, lasting three and one-half days, in which witnesses were examined under oath and documents received in evidence, the motion was denied. *United States* v. *West, supra.* An appeal from the denial of the motion in that case is presently pending before the Court of Appeals for the Sixth Circuit.

The petitioner's motion for a new trial in this case (R. 2–6) was filed in the District Court on October 17, 1958. The motion, after setting forth *verbatim* the above-mentioned letter from the Acting Assistant Attorney General, Internal Security Division, to defense counsel in the *West* case (R. 3), alleged that this newly discovered evidence indicated that Mr. Gard-

[5] Mr. Gardner testified on cross-examination at the petitioner's trial that he was born in 1906 (R. 3–4). The court in the *West* case, in its opinion denying a motion for a new trial, observed that "The evidence offered at the hearing on the motion was to the effect that Gardner had voluntarily enlisted in the Army on January 25, 1922, at the age of 15 * * *. He accomplished this by misstating his date of birth as December 13, 1903, instead of the true date of birth which was July 13, 1906" (*United States* v. *West*, 170 F. Supp. 200, 205).

ner had given untruthful testimony about his military service record in the *West* case and was inconsistent with his testimony on cross-examination in the instant case as to the date of his birth[6] (R. 3–4). The motion further alleged that the newly discovered evidence indicated that Mr. Gardner had given false information to the FBI, appearing in a statement furnished to the petitioner at the trial pursuant to the provisions of 18 U.S.C. 3500 (the so-called "Jencks" Act), to the effect (a) that he was born on July 13, 1906; (b) that he had had no military service; (c) that he had been employed by the du Pont Chemical Co. at Niagara Falls, N.Y., from 1925 to 1929; and (d) that he had resided at Niagara Falls, N.Y., from 1925 to 1929 (R. 4). The motion recited that these facts established that Mr. Gardner had "committed perjury in the West case," that he "may have committed perjury" in the instant case,[7] and that he had "violated the very statute under which [petitioner] was being tried" by giving false information to the FBI (R. 4).

On October 31, 1958, argument of the motion for a new trial (R. 12–41) was had before Chief Judge

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[6] See footnote 5, *supra*, p. 5.

[7] Mr. Gardner's date of birth was clearly immaterial to any issue presented at his trial in the case at bar or in the *West* case. Moreover, it would appear that the testimony of Mr. Gardner in the instant prosecution which the petitioner says "may have" been perjurious, *i.e.*, that he was born in 1906, was the truth, and that it was the date of birth which he apparently gave the Army when he enlisted in 1922, *viz.*, 1903, which—in order to conceal the fact that he was at that time only 15 years old and so too young to enlist—he misrepresented (see fn. 5, *supra*, p. 5).

Knous, who had presided at the petitioner's trial. In the course of the argument, counsel for the petitioner filed with the court a letter from E. I. du Pont De Nemours & Co., Niagara Falls, N.Y., stating that one Fred Leonard Gardner (the full name of the witness here involved), had worked for the Roessler and Hasslacher Chemical Company, Niagara Falls, from August 12, 1926, to February 16, 1928 (R. 15–16). It appeared from another source that du Pont had taken over this company in 1930 (R. 16). On behalf of the Government, Mr. Donald E. Kelley, United States Attorney for the District of Colorado, filed with the court a statement reciting that none of the attorneys who had prosecuted petitioner's case, nor any other attorneys or agents of the Department of Justice, including the FBI, had had any knowledge of Mr. Gardner's military service at the time of trial or prior to the receipt of information with respect thereto from the Department of the Army under the circumstances related above (*supra*, pp. 4–5) (R. 7, 12–13).

Following argument, Judge Knous rendered an oral opinion denying petitioner's motion (R. 9, 10, 41–49). Judge Knous assumed, for purposes of ruling on the motion, that Mr. Gardner had misrepresented his military service history at the *West* trial, had given erroneous information to the FBI in respect of his past employment and residences, and had made inconsistent statements with regard to the year of his birth (R. 43, 45, 48). He held, however, that, because none of these matters "went to a material issue in the case" and none had "any bearing whatsoever upon the ques-

tion of the guilt or innocence of the defendant" (R. 44), and because the newly discovered evidence relied on was merely "cumulative" and "impeaching" (R. 45), the motion presented no proper basis for the granting of a new trial (R. 43–49).

On appeal, this judgment was affirmed without opinion.

ARGUMENT

We submit that the District Court acted well within the bounds of its permissible discretion in denying the petitioner's motion, and that this case presents no issue warranting review by this Court.

The granting or denial of a motion for a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court, and its ruling should not be disturbed on appeal in the absence of a showing of a plain abuse of that discretion. See *Weiss* v. *United States*, 122 F. 2d 675 (C.A. 5), certiorari denied, 314 U.S. 687; *Long* v. *United States*, 139 F. 2d 652 (C.A. 10); *United States* v. *Johnson*, 142 F. 2d 588 (C.A. 7); *United States* v. *On Lee*, 201 F. 2d 722 (C.A. 2); *Winer* v. *United States*, 228 F. 2d 944 (C.A. 6); *Pitts* v. *United States*, 263 F. 2d 808 (C.A. 9). The petitioner, it is submitted, has failed to show any such abuse here.

It is well settled, moreover, as the District Court pointed out (*supra*, R. 45), that a motion for a new trial on the ground of newly discovered evidence which is merely cumulative or impeaching will not ordinarily be granted. *Mesarosh* v. *United States*, 352 U.S. 1, 9; *United States* v. *Johnson*, *supra*; *Murphy* v. *United States*, 198 F. 2d 87 (C.A.D.C.);

United States v. *On Lee, supra; United States* v. *Rutkin,* 208 F. 2d 647 (C.A. 3); *Pitts* v. *United States, supra.* See also *United States* v. *Johnson,* 327 U.S. 106, 110, n. 4.

The petitioner makes no claim that the new evidence relied upon in support of his motion was not of this character. That evidence consisted exclusively of proof that—to put the matter in the worst light from Mr. Gardner's standpoint—Mr. Gardner had made a number of untruthful statements in the past relating to incidents of his personal history, none of which bore in any way on the issues of the petitioner's trial. The statements, moreover, were in areas totally unrelated to the subject matter of his only material testimony in the case, *i.e.,* his testimony relative to conversations he had had with the petitioner in which the petitioner in effect admitted his continued membership in the Communist Party subsequent to the date of his purported resignation.

Thus, for example, even if it be assumed, *arguendo,* that Mr. Gardner's denial on cross-examination at the *West* trial that he had ever been in the armed forces was an intentional misrepresentation of fact in an attempt to conceal this episode in his life's history,[8]

[8] But see *United States* v. *West, supra,* 170 F. Supp. at 205, where it is pointed out that "Gardner's explanation," in the proceedings on the motion for a new trial in that case, of his negative answer to the question of whether he had ever been in the armed forces "was that he thought that the question propounded to him * * * related to whether he had been in the Armed Forces in World War II" (in which he had, in fact, not served). As we have previously noted, the question of whether or not Mr. Gardner had ever been in the armed forces had no material bearing on the issues of the *West* trial.

it is understandable as having been prompted by the fear that disclosure of the truth about his past military service might lead to prosecution for his military offense. But his willingness to make a misrepresentation of this sort has no direct relevance to his general credibility as a witness in respect of matters (such as those to which his *material* testimony at the trial related) concerning which, so far as appears, he lacked any motive for testifying falsely.

Similarly, the fact that Mr. Gardner appears to have misrepresented his age at the time of his enlistment in the Army in 1922 (to avoid being rejected as too young; see fn. 5, *supra*, p. 5) is hardly of such a type as to render his word unbelievable on any subject, particularly where the motive of self-interest is absent.

The petitioner's reliance on *Mesarosh* v. *United States*, 352 U.S. 1, and *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (Pet. 6–11), is misplaced. *Mesarosh* involved a prosecution witness at a federal trial who, after his testimony in the principal case, commenced to give extravagantly improbable testimony in other cases and proceedings (352 U.S. at 4–8). The statements were in large part *material to the proceedings* in which they were made. Similarly, the *Communist Party* case involved a situation in which allegations had been made of perjury on the part of three witnesses "in other cases on subject matter *substantially like that of their testimony in the present proceedings*" (351 U.S. at 124; emphasis added). Comparison of the alleged perjuries in other cases which were in-

volved in the *Communist Party* case (Record, No. 48, Oct. Term, 1955, pp. 2059–2064) with the types of misrepresentations and alleged misrepresentations on other occasions which are involved in this case reveals their total and material dissimilarity.

The distinction between a showing of untruthful testimony of a witness relating to material issues and untruthful statements which are collateral to the issues has been recognized by the courts. See, *e.g.*, *Casey* v. *United States*, 20 F. 2d. 752, 754 (C.A. 9), affirmed, 276 U.S. 413; *United States* v. *West*, *supra*, 170 F. Supp. 200, 211. It is, we submit, a fair and reasonable one. In any event, the District Court did not abuse its discretion in denying the petitioner's motion for a new trial in the light of the nature of the statements relied upon as newly discovered evidence.

Since, for the reasons stated, the allegations of the motion for a new trial were, even if fully established, insufficient to warrant the granting of a new trial, there was no error, contrary to the petitioner's related contention (Pet. 10–11), in refusing to grant a hearing for the presentation of evidence. See R. 48–49.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

As noted by the petitioner (Pet. 12), we do not oppose his suggestion that the Court defer action on the petition pending decision by the Court of Appeals on the petitioner's appeal from the conviction out of which the instant proceedings arose. A

decision adverse to the Government on that appeal would, if not reversed, render this proceeding moot.

We likewise do not oppose the petitioner's further suggestion that disposition of the petition be deferred pending decision by the District Court on the petitioner's second motion for a new trial, based on "newly discovered evidence contained in Gardner's testimony on the hearing on the motion for a new trial in the *West* case" (Pet. 12), since a decision on that motion adverse to the Government would (unless reversed) likewise render this proceeding moot.

We oppose, however, the petitioner's suggestion that disposition of the present petition be deferred pending decision by the Court of Appeals for the Sixth Circuit of the appeals by the *West* defendants from the denial of their motions for a new trial.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 3, 10, and 71

MAURICE E. TRAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The majority and minority opinions of the court below in No. 10 (R. 903-30) are reported at 269 F. 2d 928, 946. The majority and concurring opinions of the court below reversing petitioner's conviction after his first trial are reported at 247 F. 2d 130, 136. The opinions of the District Court for the District of Colorado in Nos. 3 (R. 44-52) and 71 (R. 22-26) are unreported, and both cases were affirmed by the Court of Appeals without opinion.

Jurisdiction

The judgments of the Court of Appeals were entered on March 27, 1959 in No. 3 (R. 59), August 3, 1959 in No. 10 (R. 930), and March 22, 1960 in No. 71 (R. 28). A petition for rehearing in No. 10 was denied August 21,

1959 (R. 935-36). On April 6, 1959 Mr. Justice Whittaker extended the time for filing a petition for a writ of certiorari in No. 3 to May 26, 1959, and on September 8, 1959 he extended the time for filing such a petition in No. 10 to October 20, 1959. The petitions for certiorari in Nos. 3, 10 and 71 were filed respectively May 25, 1959, October 16, 1959, and April 18, 1960, and all three were granted May 31, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

In No. 10 the Court of Appeals for the Tenth Circuit affirmed a judgment of the District Court of the United States for the District of Colorado, entered upon a jury verdict under an indictment, finding petitioner guilty under 18 U. S. C. 1001 for filing false non-Communist affidavits under Sec. 9(h) of the Taft-Hartley law, 29 U. S. C. 159(h), now repealed. It is not disputed that petitioner was a member of the Communist Party prior to August 1949, and that the affidavits were executed by him and mailed in Denver, Colorado, and filed with the National Labor Relations Board in Washington, D. C., in 1951 and 1952.

The questions presented in No. 10 are:

(1) Whether the venue was properly laid in the judicial District of Colorado;

(2) Whether the trial court erred in denying petitioner's motions at the trial for the production, to the defense or the court, of grand jury testimony of prosecution witnesses;

(3) Whether the evidence is sufficient to support the judgment of conviction, either with or without reference to the evidential requirements of perjury trials;

(4) Whether the petitioner was denied a fair trial by the trial court's (a) rulings on certain of petitioner's motions for production under 18 U. S. C. 3500, (b) rulings on the admission and exclusion of evidence, or (c) instructions to the jury with respect to the indicia of membership in the Communist Party in the Communist Control Act of 1954, the meaning of the terms "membership" and "affiliation", and the evidence necessary to justify a verdict of guilt.

The question presented in Nos. 3 and 71 is:

(5) Whether the trial court erred in denying, without a hearing, both the petitioner's motions for a new trial based on newly discovered evidence with respect to the credibility of one of the three prosecution witnesses.

Statutes Involved

The relevant provisions of the Constitution of the United States, the "false statements" act, 18 U. S. C. 1001, the National Labor Relations Act, as amended by the Labor Management Relations Act of 1957, the so-called "continuing offense" statute, 18 U. S. C. 3237, the Communist Control Act of 1954, and the Act of September 2, 1957, 18 U. S. C. 3500, are set forth in the Appendix, *infra* pp. 1a-6a.

Statement

The indictment (R. 1-4), returned October 28, 1954 in the United States District Court for the District of Colorado, charges the petitioner with violations of 18 U. S. C. 1001, perpetrated by making and filing two false non-Communist affidavits pursuant to Sec. 9(h) of the

Taft-Hartley law.[1] The affidavits were executed in Denver, Colorado in December 1951 and December 1952, and were received and filed at the National Labor Relations Board in Washington, D. C. (R. 27-34).

The petitioner, Secretary-Treasurer of the International Union of Mine, Mill and Smelter Workers at the time the affidavits were filed, was first tried late in 1955. He was convicted under four counts of the indictment,[2] of which two charged a false denial of Communist Party "membership" in each of the two affidavits, and two charged a false denial of Communist Party "affiliation" therein. He was sentenced to a total of eight years in prison and was fined $8,000.[3]

The conviction was reversed by the Court of Appeals because the trial court had permitted improper cross-examination of petitioner's witnesses. *Travis* v. *United States*, 247 F. 2d 130. The Court of Appeals held, however, that venue in Colorado was proper, and gave directions to the trial court concerning the jury instructions to be given at a second trial. These matters are among those presented by this petition.

Petitioner was tried again early in 1958. He did not dispute that he had been a member of the Communist Party

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[1]Sec. 9(h) was repealed by Sec. 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, P. L. 86-257, 73 Stat. 519. Sec. 504(a) of the new act provides that no person who is or has been a member of the Communist Party, or who has been convicted of certain felonies, may hold office in a union or be employed in certain other capacities during, or for five years after the termination of, his membership in the Party. 29 U. S. C. 504(a).

[2]Two other counts of the indictment, charging that petitioner falsely denied "support" of the Communist Party in each of the two affidavits, were dismissed on the Government's motion prior to the first trial (R. 15-16).

[3]Petitioner was fined $2,000 on each of the four counts. He was sentenced to imprisonment for four years on each of the two membership counts, the terms to run consecutively, and to the same prison terms on the two affiliation counts, to run consecutively with each other but concurrently with the terms of the membership counts.

prior to August 1949, and the prosecution did not dispute that, during that month, petitioner had made a public statement (R. 891) of resignation from the Communist Party "in order to make it possible for me to sign a Taft-Hartley affidavit". Thus, the issue for trial was whether or not petitioner's resignation from the Party was a pretense, in that he continued to maintain his membership at the time the affidavits specified in the indictment were filed.

Necessarily, this was the theory of the prosecution's case. Nevertheless, the prosecution offered, through one of its three witnesses, extensive testimony relating to the period from 1942 to 1948, during which petitioner's Party membership was not at issue either legally or factually. This witness (one Kenneth Eckert) also testified, over petitioner's objection, that (R. 118) the "policy of the Party was that once having joined the Communist Party you could not leave without being expelled".[4]

The prosecution introduced no evidence that, after the announcement of his resignation in 1949, petitioner paid dues or made other financial contributions to the Communist Party, attended Party meetings, carried out Party instructions, or engaged in any Party activities whatsoever or considered himself bound by Party discipline. There was no other direct evidence of any sort that petitioner had maintained his membership in or affiliation with the Party after his public resignation.

The prosecution's evidence offered to prove continued membership consisted entirely of observations and comments allegedly made by the petitioner in conversation with the other two prosecution witnesses, William Mason and Fred Gardner. Mason testified (R. 463-64) that Travis had told him that the public statement of resignation "had

[4] The admission of this testimony was prejudicial error, as shown *infra*, pp. 51-55.

been cleared with Ben Gold and the Party people in New York", and had made statements in 1952 and 1953 indicative of a continuing Party sympathy. Gardner testified that in 1951 Travis confided to him that his "public"[5] resignation from the Party "was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that . . . the enemies of the Party recognized that this was not an actual resignation . . ."

Although these and other alleged statements by the petitioner were received as "admissions", it will be seen that few if any of them,[6] fairly read, are admissions of Party membership or affiliation, particularly in the light of petitioner's 1949 public statement (R. 891) that, although he had resigned from the Party, he had not abandoned his "belief in Communism." For example, Travis' alleged statement to Gardner that "the enemies of the Party" did not regard his resignation as an actual one is very far from being an admission that either Travis or the Party did not so regard it. None of these "admissions" was corroborated by other evidence. Admittedly, the proof does not meet the evidential requirements applicable in perjury trials.

During the trial, the court denied petitioner's motions for production, either for the defense or for examination by the court, of the prosecution witnesses' grand jury testimony. In addition, the court improperly limited the cross-examination of the prosecution witnesses and, in ruling on defense motions under 18 U. S. C. 3500, improperly limited the application of that statute. In charging the jurors the

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[5]Summarizing this testimony in its Brief in Opposition to the petition (p. 7), the Government uses the much more damaging phrase "formal resignation" but the witness in fact referred to the "public resignation" (R. 443).

[6]They are set forth in the opinion below (R. 907-10), 269 F. 2d at 934-36.

court (R. 871-72) instructed them in the indicia of Communist Party membership set forth in the Communist Control Act of 1954, 50 U. S. C. 844, for their guidance in determining the issue of Party membership.

Petitioner was convicted on all four counts, and was again sentenced to imprisonment for eight years and fined $8,000. On appeal, the judgment of conviction was affirmed by a divided court. Judge Murrah dissented (R. 928-30; 269 F. 2d at 946, on the grounds that the evidential requirements of perjury convictions had not been met, and that the trial court should have examined the grand jury minutes.

Summary of Argument

I. *The Venue is Improper.* A. The Sixth Amendment to the Constitution requires that federal crimes be tried in the district where the crime was "committed." Petitioner was an officer of a national union, and under Section 9(h) of the Taft-Hartley law and the regulations of the National Labor Relations Board, his non-Communist affidavit was required to be filed with the Board in the District of Columbia. Section 9(h) makes 18 U. S. C. 1001, the so called false statement statute, applicable only to affidavits which are "on file with the Board." The essential allegation of the indictment is that petitioner caused false affidavits to be filed with the Board in Washington. Until the affidavits were filed there was no "matter within the jurisdiction of" any federal agency, within the meaning of 18 U. S. C. 1001. Indisputably the offense was committed in, and proper venue lay in, the District of Columbia. The Government does not contest this conclusion, which is supported by numerous decisions of this Court and the lower federal courts. *In re Palliser,* 136 U. S. 257; *United States* v. *Valenti* 207 F. 2d 242 (C. A. 3).

B. There is no basis for additional venue in the district of Colorado, since the offense was neither begun nor committed there within the meaning of the so-called "continuing offense" statute, 18 U. S. C. 3237. *United States* v. *Valenti*, 207 F. 2d 242 (C.A. 3). The place where petitioner's affidavit was to be filed is fixed by law in the District of Columbia, and this Court has squarely held that where the law prescribes the place where an act is to be performed, venue lies *only* at that place. *United States* v. *Lombardo*, 241 U. S. 73. The indictment fails to charge the commission of a federal offense in Colorado. Strong considerations of judicial policy likewise militate against multiple venue, and therefore require the dismissal of this indictment.

II. *Petitioner's Motions for Production of Grand Jury Testimony were Erroneously Denied.* A. Petitioner's showing of "particularized need", within the standard thus expressed in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, was sufficient. The crucial evidence against petitioner consisted entirely of uncorroborated "admissions", and it was plainly relevant to determine whether the prosecution witnesses had described these admissions in the same terms, or at all, to the grand jury. Furthermore, the trial court erroneously refused to allow petitioner to cross-examine the prosecution witnesses with respect to their grand jury testimony.

B. If not made available directly to the petitioner, the grand jury minutes should at least have been examined by the trial court *in camera*, to determine whether or not they contained testimony material to the evidence given at the trial. The trial court's refusal to examine the grand jury minutes was directly contrary to the long-established practice in the Court of Appeals for the Second Circuit, where such examination, on request of the defense counsel, is

virtually automatic, and its denial constitutes reversible error. *United States* v. *Hernandez*, F. 2d (Aug. 24, 1960); *United States* v. *Zborowski*, 271 F. 2d 661; *United States* v. *McKeever*, 271 F. 2d 669; *United States* v. *Spangelet*, 258 F. 2d 338. Every consideration of judicial policy supports the propriety and necessity of such examination, and its denial here equally requires reversal of the conviction.

III. *The Evidence was Insufficient to Support the Judgment of Conviction.* A. A conviction for perjury can not be sustained unless supported by the directly contrary testimony of two witnesses, or of one witness corroborated by evidence *aliunde*. That rule, none of the exceptions to which is governing here, applies to prosecutions under the statutes involved in this case, since false swearing in an affidavit duly filed is the essence of the offense. See *American Communications Association* v. *Douds*, 339 U. S. 382, 420, 436.

B. If the perjury rule applies here, the conviction must be reversed, since the trial court refused either to apply the rule in passing on petitioner's motion to dismiss, or to instruct the jury in accordance therewith. *Weiler* v. *United States*, 323 U. S. 606. The evidence plainly does not meet the requirements of the rule, and the government does not so contend.

C. The only evidence of petitioner's membership in or affiliation with the Communist Party, at the time the affidavits were filed, consists of uncorroborated extra-judicial admissions made, if at all, after the commission of the offense. Such evidence is insufficient to sustain a conviction. *Opper* v. *United States*, 348 U. S. 84. The government's attempted distinction between admissions to government agents and to private persons is untenable. See *United States*

v. *Carminati*, 247 F. 2d 640, 644 (C. A. 2); *United States* v. *Nystrom*, 237 F. 2d 218, 225 (C. A. 3).

D. Even without reference to the foregoing rules, the evidence was insufficient. There was no evidence of any overt conduct indicative of petitioner's continued membership in the Communist Party, nor of his continuing "desire" to belong, nor of the Party's continuing "recognition" of his membership. Taken at face value, the evidence shows nothing more than a continuing sympathy with certain communist purposes. This is insufficient to establish either membership in or affiliation with the organization. *Bridges* v. *Wixon*, 326 U. S. 135; *Galvan* v. *Press*, 347 U. S. 522.

IV. *Petitioner Was Denied a Fair Trial by The Court's Evidential Rulings and Application of 18 U. S. C. 3500.*

A. Prejudicial evidence was erroneously admitted. The witness Eckert was permitted, over objection, to testify (R. 118) that the policy of the Communist Party was "that once having joined you could not leave without being expelled." Since there was no evidence that any such policy was known to the petitioner, this testimony was incompetent and irrelevant. Furthermore, it is directly contrary to the basis upon which the constitutionality of this provision of the Taft-Hartley law was upheld, as stated by this Court in the *Douds* case, 339 U. S. at 414.

B. Petitioner's cross-examination of prosecution witnesses was erroneously and prejudicially restricted. The trial court refused to allow questioning with respect to the witness Mason's interrogation by the Immigration and Naturalization Service in 1952, to show that Mason, a naturalized citizen, was fearful of denaturalization and deportation because of past Communist Party membership. The Court likewise refused to permit questioning of the witnesses Eckert and Gardner with respect to rivalry and hostility between petitioner's union, from which Gardner

had been discharged and Eckert separated, and the unions by which they were subsequently employed. Those matters were appropriate subjects of cross-examination to show bias and interest, and the rulings were an abuse of the trial court's discretion.

C. The trial court's interpretation and application of 18 U. S. C. 3500 were erroneously and prejudicially limited. The court disregarded the injunction of *Palermo* v. *United States*, 360 U. S. 343, that documents of doubtful status under 18 U. S. C. 3500(e) should be produced for *in camera* examination to determine whether or not they fall within the statutory language. It likewise failed to require the government to ascertain whether or not the prosecution witnesses had made statements to government attorneys or to Congressional investigative agents, contrary to the terms of the statute.

V. *Petitioner Was Denied a Fair Trial by the Court's Charge to the Jury with Respect to Membership in and Affiliation with the Communist Party.* The trial judge embodied in his charge eleven of the thirteen evidentiary indicia of membership set forth in Section 5 of the Communist Control Act of 1954, 50, U. S. C. 844. Assuming the statutory indicia had any proper place in the charge, omission of the first two (listing as a member and financial contributions to the Party), with respect to both of which there was a complete failure of proof, was plainly prejudicial. But the other indicia, especially paragraphs (6), (9), (11), (12), and (13), are vague and irrelevant to the issues of membership and affiliation, and highly prejudicial. Their inclusion in the charge both deprived petitioner of a fair trial, and violated his rights under the First Amendment.

VI. *Petitioner's Motions for a New Trial Based on Newly Discovered Evidence Were Erroneously Denied.* The new evidence in No. 3, based on Army service records and the witness' own testimony in another case, indisputably shows that the witness Fred Gardner gave false testimony in the other case, and false information to the Federal Bureau of Investigation, to the effect that he had never served in the armed forces when in fact he had deserted from the Army in 1926. The new evidence in No. 71 shows that Gardner gave false testimony in the present case and the other case about his marital history. These facts serve to discredit Gardner's veracity and, since he was one of two witnesses who testified to petitioner's uncorroborated post-affidavit "admissions", the new evidence goes to the heart of the government's case. Under these circumstances, it was an abuse of discretion to deny the motions for a new trial.

Argument

The trial of this cause precipitated procedural issues which are basic to the fair administration of criminal justice in the courts of this nation. Some of them—for example, the extent of a defendant's right to the production of grand jury testimony given by prosecution witnesses—may and do arise in criminal proceedings of any description. Others, such as the applicability here of the evidential requirement observed in perjury trials, or the legally cognizable indicia of "membership", are of special importance for the ever more numerous cases where, as here, the defendant is accused of misrepresenting his political affiliations or beliefs. All of these issues touch closely on the guarantee of fairness embodied in the due process clause.

I.

THE VENUE WAS IMPROPER

At the threshold of this case, however, lies the issue of venue, which arose before the trial began (R. 5). The affidavits on which the charge of falsity is based were filed, as the law requires, in the District of Columbia. Not until they were so filed was there any offense against the laws of the United States, or any matter within the jurisdiction of any federal agency. Unless the Government can support the jurisdiction of the District Court of Colorado, where the petitioner was tried, the entire proceeding is a nullity and the indictment must be dismissed. And, as was remarked in *United States* v. *Johnson*, 323 U. S. 273, 276: "Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed."

A. The offense with which petitioner is charged was committed in the District of Columbia.

Under the Sixth Amendment to the Constitution, one who is accused under federal law is entitled to be tried in the district "wherein the crime shall have been committed." Under this requirement, ". . . determination of proper venue in a criminal case requires determination of where the crime was committed." *United States* v. *Cores*, 356 U. S. 405, 407. To make this determination, it is necessary to see (a) what acts are proscribed or required by the criminal statute, and (b) what acts are charged in the indictment. *Johnston* v. *United States*, 351 U. S. 217, 220.

Section 9(h) of the Taft-Hartley law did not absolutely require that union officers file non-Communist affidavits, but

prescribed such filings as a condition precedent to a union's use of the Labor Board's procedures. *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145; *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 352 U. S. 153. Nor did Section 9(h) specify its own penalties for filing false affidavits; rather it made 18 U. S. C. 1001 (the "false statement" statute) "applicable in respect of such affidavits". The "such" clearly refers back to affidavits which are "on file with the Board". The false statement statute makes it an offense knowingly to make or use a false statement or document "in any matter within the jurisdiction of any department or agency of the United States."[7]

Each count of the indictment (R. 1-4) charges the petitioner with a violation of 18 U. S. C. 1001 in that he knowingly "made and used, within the District of Colorado, a false writing and document, namely an 'Affidavit of Non-communist Union Officer', (Form NLRB 1081), executed within the District of Colorado . . . which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia . . ." The affidavits signed by petitioner, on Form NLRB 1081 referred to in the indictment, carry on the reverse side (R. 885) "Instructions for the Use of This Form", include the following:[8]

> "National and International Labor Organizations must file this affidavit with the Affidavit Compliance Branch, National Labor Relations Board, Washington 25, D. C.

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[7]Both Sec. 9(h) of the Taft-Hartley law and 18 U. S. C. 1001 are set forth in the Appendix, *infra* pp. 1a-2a.

[8]It is not disputed that petitioner was an officer of a national and international labor organization, nor that petitioner was required, by the regulations of the Labor Board, to file the affidavit with the Board in Washington. 247 F. 2d at 132, note 2.

Local Labor Organizations must file this affidavit with the Regional Office of the National Labor Relations Board with which they usually file cases.

It is apparent, therefore, that the offense with which petitioner is charged was committed (if committed at all) in the District of Columbia. The indictment charges that the petitioner filed the affidavits there. Lacking such an allegation, the indictment would not state an offense under the laws of the United States, for Section 9(h) of the Taft-Hartley law makes 18 U. S. C. 1001 applicable only to affidavits which are on file with the Board. Furthermore, until the affidavits were filed there was no "matter within the jurisdiction of any department or agency of the United States" within the meaning of 18 U. S. C. 1001.

To be sure, Congress might have enacted a statute making it an offense to prepare, or execute, or deposit in the mail a false affidavit for use under Section 9(h) of the Taft-Hartley law, and in that event the offense would be committed where the affidavit was prepared, executed or mailed. Such statutes have been enacted with respect to the preparation of income tax returns,[9] as well as to prohibit the *posting* of ransom letters,[10] the *depositing* of lottery or other unlawful literature in the mail,[11] or the *transmitting* of false pension papers.[12]

But under Section 9(h), the statute proscribed filing a false affidavit and the offense is committed when and where the affidavit is filed. The lower federal courts have so ruled

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[9] *United States* v. *Albanese*, 224 F. 2d 879 (C. A. 2); *United States* v. *Hoover*, 233 F. 2d 870 (C. A. 3); *Beaty* v. *United States*, 213 F. 2d 712 (C. A. 4); *cf. Ex parte Shaffenburg*, Fed. Cas. No. 12,696 (C. C. D. Col.).

[10] *United States* v. *Streiel*, 99 F. 2d 474 (C. C. A. 2).

[11] *United States* v. *Ross*, 205 F. 2d 619 (C. A. 10); *United States* v. *Conrad*, 59 Fed. 458 (C. C. D. W. Va.).

[12] *United States* v. *Bickford*, Fed. Cas. No. 14,591 (C. C. D. Vt.).

in every case[13] that has arisen under this law, generally with the observation that, until the affidavit is filed, there is no "matter within the jurisdiction of" the Labor Board.[14]

We do not understand that the Government contests this conclusion[15] which, in any event, is in line with the general rule that, where the offense charged is the filing, delivery, or receipt of a false or otherwise unlawful document, the offense is committed where the document is filed, delivered, or received. *In re Palliser*, 136 U. S. 257; *Burton* v. *United States*, 196 U. S. 283;[16] *Reass* v. *United States*, 99 F. 2d 752 (C. C. A. 4); see *United States* v. *Lombardo*, 241 U. S. 73, 76: "A paper is filed when it is delivered to the proper official and by him received and filed."[17] Directly

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[13]The opinion below in the instant case is not to the contrary, since the decision goes on the theory that the offense, though committed in Washington, was begun in Denver. This question is discussed *infra*, pp. 17-29.

[14]*United States* v. *Valenti*, 207 F. 2d 242, 244 (C. A. 3); *Hupman* v. *United States*, 219 F. 2d 243, 246-247 (C. A. 6); *United States* v. *Killian*, 246 F. 2d 77, 80 (C. A. 7); *Sells* v. *United States*, 262 F. 2d 815, 821 (C. A. 10); *United States* v. *Bryson*, 16 F.R.D. 450, 453 (N. D. Cal.).

[15]Hugh Bryson, an officer of a national union, was indicted in the District of Columbia for filing with the Board an affidavit executed and mailed in California. *United States* v. *Bryson*, 16 F.R.D. 431 (N. D. Cal.). The indictment in the District of Columbia followed Judge Carter's suggestion that the difficulties concerning venue in California would be removed by proceeding in the District of Columbia. *United States* v. *Bryson*, 16 F.R.D. 450 (N. D. Cal.). Thereafter the Government moved to dismiss the indictment in California on the ground that the offense had more probably been committed in the District of Columbia, and District Judge Goodman granted the motion with the observation that the attorney general's "decision in that regard appears to be based on good reason. . . ." *United States* v. *Bryson*, 16 F.R.D. 453 (N. D. Cal.).

[16]Compare the later case, *Burton* v. *United States*, 202 U. S. 344, in which the same defendant was indicted for *agreeing to receive* (rather than receiving) unlawful compensation, and venue was held proper in the district where the agreement was made, rather than where the compensation was received.

[17]See also *Wampler* v. *Snyder*, 66 F. 2d 195 (C.A.D.C.); *Fuller* v. *United States*, 110 F. 2d 815 (C.C.A. 9); *Bowles* v. *United States*,

applicable here are the words of William Howard Taft, then Solicitor General, in his brief (pp. 24-25) for the Government in the *Palliser* case, *supra*:

> "The gist of the offense is the offer to an officer . . . It would seem, therefore, that the place where the officer was when approached and solicited would be the place of the crime. If the communication never reached the officer it would be no crime."

B. Venue in the District of Colorado cannot be supported under the so-called "continuing offense" statute, 18 U. S. C. 3237.

Accordingly, the issue in the present case is not whether proper venue lies in the District of Columbia *or* the District of Colorado. Venue lies in the District of Columbia because the offense charged was committed (if at all) therein. The only issue is whether there is *also* venue in the District of Colorado, on the theory that the offense was "begun" there by the execution of the affidavits (as charged in the indictment) or by their deposit in the mail (as subsequently stipulated, R. 27-34). The Government and the court below concluded that there was venue in Colorado as well as in Washington, relying on the so-called "continuing offense" statute which reads, in relevant part,[18] as follows (18 U. S. C. 3237):

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United

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73 F. 2d 772 (C.C.A. 4); *Shurin* v. *United States*, 164 F. 2d 566 (C.C.A. 4); *United States* v. *Borow*, 101 F. Supp. 211 (D.N.J.); *United States* v. *Lefkoff*, 113 F. Supp. 551 (E.D. Tenn.); *United States* v. *Warring*, 121 F. Supp. 546 (D. Md.); *United States* v. *Eisler*, 75 F. Supp. 634 (D.D.C.); *United States* v. *Hill*, 8 F. Supp. 469 (M.D. Pa.) aff'd 74 F. 2d 940 (C.C.A. 3).

[18]The second paragraph of 18 U. S. C. 3237 (*infra*, p. 6a) relates only to offenses of which the use of the mails, or transportation in interstate commerce, is an essential element, and therefore is not relevant to this case.

States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

In the only other Court of Appeals decision on this issue, it was held that neither the execution nor the mailing of a Section 9(h) affidavit constitutes the beginning of an offense within the meaning of the statutory language, or suffices to support venue in any district other than the one wherein the affidavit is filed. *United States* v. *Valenti*, 207 F. 2d 242 (C. A. 3);[19] see also *United States* v. *Gibbons* and *Brown*, unreported, Crim. Nos. 27848(3) and 28017(2) (E. D. Mo.).[20] We submit that the decision below is wrong and that the *Valenti* case is right, under the language of the statutes here applicable and the reasoning of the courts in comparable cases, and on important grounds of judicial policy.

The legitimate scope of 18 U. S. C. 3237 is limited by the Sixth Amendment's guarantee of trial in the district "wherein the crime shall have been committed". See *United States* v. *Anderson*, 328 U. S. 699, 704-05; *Brown* v. *Elliott*, 225 U. S. 392, 402.[21] Furthermore, 18 U. S. C. 3237 is

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[19]The opinion by Circuit Judge Maris was concurred in by Chief Judge Biggs. Circuit Judge Hastie concurred on the ground that there was no proof of mailing in the district where the defendant was indicted and tried, but expressed the view that mailing a Section 9(h) affidavit does constitute a "beginning" within the meaning of 18 U. S. C. 3237.

[20]The *Gibbons* and *Brown* cases reached the same conclusion with respect to allegedly false financial information filed pursuant to Section 15g(g). In the *Bryson* case, where the affidavit was mailed from California, District Judge Carter expressed the view that venue could be supported in California under 18 U. S. C. 3237, while Judges Goodman and Murphy thought otherwise. *United States* v. *Bryson*, 16 F. R. D. 431, 450, 453.

[21]See also *United States* v. *Ross*, 205 F. 2d 619, 621 (C. A. 10); *United States* v. *Conrad*, 59 Fed. 458 (C. C. D. W. Va.); *United States* v. *Horner*, 44 Fed. 677 (S. D. N. Y.).

not a substantive provision of law, and does not itself make any federal offense a "continuing" one,[22] or prescribe what the "beginning" or the "completion" of any specific offense entails.

Constitutional obstacles do not arise when the offense is initially "complete" in the sense that all the essential elements are present, and the accused continues to commit the completed offense in another or several districts. Congress may then provide that the offense shall be punishable in any district where the continuing commission occurs. These are true "continuing offenses", such as unlawful use of the mails or continuing illegal transportation in interstate commerce. *Armour Packing Co.* v. *United States*, 209 U. S. 56; *United States* v. *Freeman*, 239 U. S. 117.[23]

Even in such cases, however, considerations of constitutional policy (rather than limitation) may lead the courts to confine venue to the state where the crime first became complete (in the legal sense), if it is not clear that Congress intended to make the offense a continuing one. Compare *United States* v. *Johnson*, 323 U. S. 273 ("use of the mails" for the shipment of unlicensed dentures not a continuing offense in the absence of express Congressional declaration) with *United States* v. *Cores*, 356 U. S. 405 ("remaining" in the United States after expiration of alien seaman's permit, a continuing offense even in the absence of Congressional declaration). And constitutional limitations may come into play when a complete offense is clearly not of a continuing

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[22] Except in the second paragraph of 18 U. S. C. 3237, irrelevant here. This second paragraph was enacted as a result of this Court's decision in *United States* v. *Johnson*, 323 U. S. 273, as is set forth in the Reviser's Note, based on H. Rep. No. 304, 80th Congress.

[23] See also *United States* v. *Floyd*, 228 F. 2d 913 (C. A. 7); *Bickford* v. *Looney*, 219 F. 2d 555 (C. A. 10); *Kreuter* v. *United States*, 218 F. 2d 532 (C. A. 5); *In re Richter*, 100 Fed. 295 (E. D. Wis.).

nature, and either Congress or the Department of Justice seeks to base venue on legally irrelevant subsequent events.[24]

The problem in the present case is the converse of those discussed above, for here the Government is seeking to use 18 U. S. C. 3237 to establish venue in a district where the crime is not yet complete. As all the decisions agree (*supra*, p. 16), the essence of the offense charged here is the *filing*, which took place in Washington. May 18 U. S. C. 3237 be constitutionally applied to support venue in a district in which the offense was *not* committed, in that only preliminary and not the proscribed acts took place there?

This Court has never so held,[25] and neither the language of nor the Congressional purpose embodied in the statute justifies any such result. Although its legislative origins are cloudy, it was born in close conjunction with the statute punishing conspiracies to defraud or commit offenses against the United States,[26] and it closely resembles the

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[24]See *United States* v. *Conrad*, 59 Fed. 458 (C. C. D. W. Va.), in which the offense was *depositing* lottery literature in the mails, and the court held unconstitutional a provision for trial in a district to which the literature was carried by mail. Whether or not rightly applied in that particular case, the principle of the decision is sound; clearly, Congress could not constitutionally provide that one who robs the mails may be tried in any district in which he is thereafter apprehended.

[25]The strong implications of *Burton* v. *United States*, 196 U. S. 283, 304, are in the negative, and the same is true of Mr. Justice Gray's opinion in the *Palliser* case, 136 U. S. at 267, in which the question was specifically reserved, as it was also in *Benson* v. *Henkel*, 198 U. S. 1. The Court has indicated that a conspiracy charge may be brought in the district where the agreement was entered into, even though the overt acts took place elsewhere. *Hyde* v. *Shine*, 199 U. S. 62; but *cf. Brown* v. *Elliott*, 225 U. S. 392, 402. However, the conspiracy cases are complicated by the concept that the crime of conspiracy is complete when the agreement is reached, and that the overt acts are not part of the offense. See *Hyde* v. *United States*, 225 U. S. 347, 367, and Mr. Justice Holmes' dissent therein.

[26]The conspiracy provision (now 18 U. S. C. 371) and the continuing offense clause (now 18 U. S. C. 3237) originally comprised the two sentences of Sec. 30 of "An Act to Amend Existing Laws

numerous State statutes covering crimes partly committed in each of several counties,[27] the purpose of which was to abrogate the old common law rule that where an offense comprised a series of acts, some of which took place in one county and some in another, there could be no prosecution in either.[28] There is no indication in the background of 18 U. S. C. 3237 that it was intended[29] to impinge upon the guarantee of the Sixth Amendment, and on well established principles of interpretation it should be construed so as to avoid constitutional doubts.

The present case must be approached in the light of these considerations. Congress has expressly provided that 18 U. S. C. 1001 shall only be applicable to Taft-Hartley

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Relating to Internal Revenue, and for Other Purposes", enacted March 2, 1867. See *United States* v. *Gradwell*, 243 U. S. 476, 481. This section was not part of the bill as it passed the House of Representatives; it was added as an amendment in the Senate Committee on Finance, and was adopted by the Senate without discussion on motion of the floor manager, Senator William Pitt Fessenden. See the *Congressional Globe*, 39 Cong. 2d Sess., pp. 1846, 1881, 1920 and 1968. The conspiracy portion became R. S. 5440, and the "continuing" portion R. S. 731.

[27]The Sixth Amendment, of course, binds only the Federal Government. Section 2 of Article III of the Constitution requires that the trial of all crimes shall be in the state where the crimes were committed, and this applies to both the federal and state governments. However, many state constitutions contain provisions requiring that trials be conducted in the county wherein the crime was committed, so that venue problems analogous to the one here posed also arise under state law.

[28]See *Matter of Murtagh* v. *Leibowitz*, 303 N. Y. 311, 101 N. E. 2d 753 (1951); *Wharton's Criminal Law and Procedure* (Anderson edit., 1957), Sections 1507 and 1510.

[29]In his opinion for the Court in *Hyde* v. *United States*, 225 U. S. 347 at 360, Mr. Justice McKenna observed, with reference to this statute (then R. S. 731), that: "This provision takes an emphasis of signification from the fact that it was originally a part of the same section of the statute which defined conspiracy—that is § 30 of the Act of March 2, 1867, 14 Stat. 484, c. 169. Nor has the provision lost the strength of meaning derived from such association by its subsequent separation . . ."

affidavits which are *on file*, and that 18 U. S. C. 1001 itself shall come into play only with respect to matters "within the jurisdiction" of a federal agency. Neither the execution nor the mailing of the affidavit in Denver constituted a filing, or established the Board's jurisdiction. Nothing that the petitioner is charged with doing in Colorado is unlawful under federal law.[30] How, then, can it be said that the offense was "begun" in Colorado, and how can venue be placed in Colorado, without raising grave questions under the Sixth Amendment?[31]

Accordingly, there is no statutory basis for, and serious constitutional difficulties would attach to, venue in Colorado in the present case. In comparable situations, this Court has said and the lower courts have held that 18 U. S. C. 3237 furnishes no basis for jurisdiction or venue except in the district where the filing (or other offense) takes place. The well-established rule is that, when the place for the performance of an act is specified by law (as here), a wrongful performance of or failure to perform the act is punishable at, and only at, the place so specified.[32] Such an offense is

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[30]Accordingly, the example of firing a bullet across a state line relied on in Judge Hastie's concurring opinion in the *Valenti* case, 207 F. 2d at 246, is not apt here, for firing a gun is an illegal act, even though the bullet strikes the victim in another state. Nor, in such cases, is there any problem of agency jurisdiction such as 18 U. S. C. 1001 involves. Even so, the rule at common law was that venue lies where the bullet strikes, not where it is fired. *United States* v. *Davis*, Fed. Cas. No. 14932 (C. C. D. Mass.); *cf. People* v. *Rathbun*, 21 Wend. 509, 536 (N. Y. 1839).

[31]Compare *In re Buell*, Fed. Cas. No. 2102 (C. C. E. D. Mo. 1875), in which the defendant was indicted in the District of Columbia for a criminal libel composed there but published in Michigan. In that case (apparently the first under the "continuing offense" statute, then R. S. 731), the Government contended that the offense had been begun in the District of Columbia, but the court rejected this "alarming and dangerous doctrine", on the ground that the offense charged was not completed in the District of Columbia.

[32]Quite distinct are statutes which prohibit conduct unless a document has *previously* been filed or obtained, such as driving a car with-

not "continuing", and does not have a "beginning" in a legal sense; the offense comprises a single act, committed only at the place specified by law.[33]

The principle is plainly stated in *United States* v. *Lombardo*, 241 U. S. 73, which the Court of Appeals in the *Valenti* case (207 F. 2d at 245) rightly thought governing in cases such as the present one. In the *Lombardo* case, the defendant was indicted under Section 6 of the White Slave act, which required one who harbored an alien prostitute to file a report with the Commissioner of Immigration within 30 days. The defendant was indicted at the place of harboring and the Government, invoking R. S. 731, contended that there was a continuing offense beginning with the failure to mail the report within the specified

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out a license or engaging in the numbers racket without having previously paid a tax. In such cases criminal liability attaches not to the failure to file or pay at a designated place, but to the subsequent conduct. *Beach* v. *United States*, 240 F. 2d 888 (C. A. D. C.); *Reynolds* v. *United States*, 225 F. 2d 123 (C. A. 5); *United States* v. *Bowman*, 137 Fed. Sup. 385 (D. D. C.).

[33] Even if the place is not fixed by law, the offense may be of such a nature that venue lies only where the document or other thing is delivered or received, and not where it is mailed. In the *Palliser* case, *supra*, where the offending letter was mailed in New York, Mr. Justice Gray said (136 U. S. at 267) that ". . . it might admit of doubt whether any offense against the laws of the United States was committed until the offer or tender was known to the postmaster . . ." in Connecticut. In *Burton* v. *United States*, *supra*, where the unlawful compensation was mailed by the payor in Missouri to the defendant-recipient in Washington the court held that there was no jurisdiction in Missouri, and Mr. Justice Peckham said (196 U. S. 304): "This is not a case of the commencement of a crime in one district and its completion in another, so that under the statute the court in either district has jurisdiction. Rev. Stat. sec. 731 . . . There was no beginning of the offense in Missouri. The payment of the money was in Washington, and there was no commencement of that offense when the officer . . . sent the checks from St. Louis to defendant. The latter did not thereby begin an offense in Missouri." See also *Horner* v. *United States*, 143 U. S. 207; *Salinger* v. *United States*, 272 U. S. 542.

time. But the court pointed out that Section 6 required *filing* at a specified place, and affirmed the lower court's order sustaining a demurrer to the indictment. Mr. Justice McKenna noted (241 U. S. at 77) that crimes consisting of "distinct parts" or involving "a continuously moving act" might support multiple venue under R. S. 731, and remarked that a father's breach of statutory obligation to support children might be triable either where the father neglected or where the child suffered. However, as he then stated (241 U. S. 78):

> "The principle is not applicable where there is a place explicitly designated by law, as in § 6."

The court below (247 F. 2d at 133) sought to distinguish the *Lombardo* case on the ground that it involved a failure to file a document, rather than the filing of a false one. Where, as here, the place of performance is fixed by law, it is difficult to understand why an offense should be considered as "begun" by mailing a false document, but not by failing to transmit any document at all. The attempted differentiation between misfeasance and non-feasance is an empty one, irrelevant to the question of venue, and without basis in logic or policy. It finds no support in the decisions of this Court and none, except for a single dictum,[34] in those of the lower federal courts.

It is true that many of the cases establishing venue solely at the place fixed by law for a performance—including the most recent decision by this Court[35]—are cases

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[34] *New York Central and H. R. R. Co.* v. *United States*, 166 Fed. 267, 270 (C. C. A. 2 1908).

[35] *Johnston* v. *United States*, 351 U. S. 217, involving a conscientious objector's failure to report for duty at a designated place. The dissent does not challenge the principle that venue lies at the place fixed by law for the performance of the obligation; rather it is based on the conclusion (351 U. S. at 224) that Congress did not make non-performance at the place so specified the essence

involving a wrongful failure to perform rather than a wrongful performance.[36] But the same rule has been applied in numerous cases where, as here, the alleged offense is one of misfeasance, and the charge is the filing of a false document at the place fixed by law for that purpose. *Bowles* v. *United States*, 73 F. 2d 772 (C. C. A. 4), cert. denied 294 U. S. 710; *United States* v. *Valenti*, 207 F. 2d 242 (C. A. 3); *Wampler* v. *Snyder*, 66 F. 2d 195 (C. A. D. C.).[37] These decisions are in line with the common law rule[38] and the guarantee of the Sixth Amendment, and

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of the particular offense. *Cf. United States* v. *Anderson*, 328 U. S. 699, 703. In the present case, there is no question but that the filing in Washington is specified in Section 9(h) as the essence of the offense under 18 U. S. C. 1001.

[36] *Rumely* v. *McCarthy*, 250 U. S. 283; *Jones* v. *Pescor*, 169 F. 2d 853 (C. C. A. 8); *United States* v. *Commerford*, 64 F. 2d 28 (C. C. A. 2); *Yarborough* v. *United States*, 230 F. 2d 56 (C. A. 4); *United States* v. *Neill*, 248 F. 2d 383 (C. A. 7); *United States* v. *Lennox*, 258 F. 2d 320 (C. A. 3); *United States* v. *Wyman*, 125 F. Supp. 276 (W. D. Mo.); *Matter of Murtagh* v. *Leibowitz*, 303 N. Y. 311, 101 N. E. 2d 753; *Regina* v. *Miller*, 2 Car. & K. 310 (N. P. 1846).

[37] Also *United States* v. *Aaron*, 117 F. Supp. 952 (N. D. W. Va.); *United States* v. *Warring*, 121 F. Supp. 546 (D. Md.); *United States* v. *Hill*, 8 F. Supp. 469 (M. D. Pa.); *United States* v. *Lefkoff*, 113 F. Supp. 551 (E. D. Tenn.); *cf. State* v. *Pollard*, 215 La. 655, 41 So. 2d 465. The same reasoning was applied, although the question of venue based on mailing was reserved, in *Reass* v. *United States*, 99 F. 2d 752 (C. C. A. 4); *Shurin* v. *United States*, 164 F. 2d 566 (C. C. A. 4) (with a strong dictum at 569 that mailing would not support venue); *United States* v. *Borow*, 101 F. Supp. 211 (D. N. J.).

[38] *Wharton's Criminal Law and Procedure* (Anderson edit. 1957):

> "§ 1507—In many cases requisite elements of the completed crime may be commited in different jurisdictions, and in such cases any state in which an essential part of the crime is committed may take jurisdiction. It is necessary, however, to discriminate with great care between acts essential to the crime and acts merely incidental thereto. For example, the mere forwarding of money from one state to another for . . . any . . .

there is no substantial authority to the contrary.[39] The case of *De Rosier* v. *United States*, 218 F. 2d 420 (C. A. 5), relied on below (247 F. 2d at 134), is not in point, since there was no place of performance fixed by law, and the matter was already within the jurisdiction of the federal agency at the time of mailing.[40]

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transaction forbidden by the laws of the former state, does not constitute a crime punishable therein, although it is otherwise if the statute makes the forwarding of the money, and not merely the transaction itself, a crime.

"§ 1510—In many states statutes have been passed providing for venue in either county, where a crime is committed partly in one county and partly in another. Such statutes apply only when the offense is divisible and when each of the parts committed in the different counties is itself unlawful. . . . If the act committed in one county did not constitute any element of the crime charged, then such county does not have jurisdiction, a statute of the type here considered not being applicable. . ."

[39]In *Bridgeman* v. *United States;* 140 Fed. 577 (C. C. A. 9) relied on by the Government, the place of filing was not fixed by law. In *United States* v. *United States District Court,* 209 F. 2d 575 (C. A. 6), involving a prosecution for filing a false income tax return, venue for trial at the place of mailing was upheld (Miller, C. J., dissenting). However, the indictment had been lodged at the place of filing the return and the defendant sought transfer to the place of mailing, so the case is essentially no different from *United States* v. *Bryson* 16 F. R. D. 431 (N. D. Cal.).

[40]The *De Rosier* case involved a government employee loyalty proceeding in which, after the Post Office Department Loyalty Board in Washington had written a letter to the defendant in Florida charging him with membership in the Ku Klux Klan and giving him 30 days to answer, the defendant mailed a reply in Florida containing the alleged false statements. The court (Holmes and Borah, Circuit Judges) upheld venue of the prosecution under 18 U. S. C. 1001 in Florida, relying on 18 U. S. C. 3237. But the decision has no bearing here, because the matter was already within the jurisdiction of the Loyalty Board at the time the defendant mailed the reply, and (so far as appears in the opinion) because there was no place fixed by law for filing the reply. See *United States* v. *Valenti,* 120 F. Supp. 76 (E. D. N. Y.) (no place fixed by law for filing) and *United States* v. *Dolan,* 119 F. Supp. 309 (E. D. N. Y.) (matter already within jurisdiction of Federal Housing Administration when mailed), in

Apart from the legal considerations set forth above,[41] there are strong considerations of judicial policy that support restriction of venue, in cases such as the present one, to the district in which the offense is committed. Multiple venue under 18 U. S. C. 3237 is no doubt desirable in the situations for which the statute was intended such as conspiracy, where there may be numerous defendants, and acts in furtherance of the conspiracy committed in several districts, or where the essence of the crime is the wrongful use of the mails or the channels of interstate commerce, and the criminal act itself pervades two or more districts.

But none of these considerations is applicable here, since Congress has carefully specified the *locus* of the offense, and the crime consists of the single act of filing a document at the place specified by law.[42] The Sixth Amendment states

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which these very differences were expressly relied upon to uphold venue based on mailing.

However, the *de Rosier* case, as well as the *Bridgeman* and *District Court* cases, *supra* footnote 39, although not in conflict with the rule establishing venue at the place fixed by law for filing, are in conflict with *Burton* v. *United States* and the dictum in the *Palliser* case, both *supra* p. 23.

[41]The indictment in the present case (R. 1-4) does not charge petitioner with mailing the affidavits, and timely objection was made (R. 5) on the ground that the indictment failed to state facts showing an offense in the District of Colorado. Hence, even if venue might be grounded on mailing if properly charged, the indictment against petitioner must be dismissed, since ". . . under the Sixth Amendment to the Constitution the accused cannot be tried in one district on an indictment showing that the offense was not committed in that district . . ." *Salinger* v. *Loisel*, 265 U. S. 224, 232. To be sure, the trial court (R. 15) ordered the Government to establish mailing by a bill of particulars, but such a bill cannot be used to cure an indictment's lack of an essential allegation, where timely challenge before trial has been made. *United States* v. *Lattimore*, 215 F. 2d 847, 850 (C. A. D. C.); *United States* v. *Lamont*, 236 F. 2d 312, 315 (C. A. 2).

[42]Neither, under these circumstances, are the considerations referred to in *United States* v. *Johnson*, 323 U. S. 273, governing here. In that case the defendant's crime was complete in Illinois where he deposited the unlawful dentures in the mail, and the Government

that trials shall be held where the crime is committed, and in cases such as the present one, the thrust of constitutional policy is against multiple venue, and against trial in any district except the one in which the place of the crime is designated by law. There is no reason why the accused should be subject to trial in either of two districts at the Government's choice. Under the Sixth Amendment multiple venue is the exceptional, not the usual, and the language of 18 U. S. C. 3237 should not be stretched so as to create multiple venue except where the Constitution clearly permits and statutory policy warrants such a result.

The *residence* of the accused is, of course, irrelevant, since the constitutional guarantee relates to the place where the offense is committed, and that place, not the residence of the accused, is the vicinage. *Haas* v. *Henkel*, 216 U. S. 462. On this point the trial court was misled (R. 14), as was the court in *United States* v. *Cashin*, 281 F. 2d 669 (C. A. 2). In both instances reliance was placed on the *Johnson* case, wherein the Court spoke (323 U. S. at 275) of remoteness "from home and from appropriate facilities for defense", but it is clear that the Court was looking to the vicinage of the offense, not the accused's residence, and would have reached the same result if the accused had resided elsewhere.[43]

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sought to establish additional venue in Delaware where the dentures were received. Since the offense was complete in Illinois and Congress had not expressly provided for continuing venue, the Court held (323 U. S. at 275-278) that there was venue only in the district of mailing, which was the vicinage of the offense. But in the present case it is the filing upon receipt, and not the mailing, which constitutes the offense. The crime is committed only when the affidavit is filed and the vicinage of the offense is the District of Columbia, not the District of Colorado.

[43]Even if residence were a factor to be considered, the venue here sought to be established would not necessarily lead to trial at the place of residence. It is true that the petitioner, as Secretary-Treasurer of the union, lived in Denver, where the union's headquarters were

Quite apart from the rights of the accused under the Sixth Amendment, there is also the factor of *certainty*. Litigation over the issue of venue is time-consuming and expensive for all parties. The rule of single venue at the place specified by law for the filing of documents or performing any other act is a highly salutary one from the standpoint of certainty. To open up the rule to a flood of exceptions based on the theory of a "beginning" in some other district would inevitably lead to a host of totally unnecessary false starts and appeals, of which the instant case gives sufficient warning.[44]

Even from the Government's standpoint, accordingly, dismissal of this indictment for improper venue is a small price to pay for the jurisdictional stability that will flow from a reaffirmation of the well-established rule that venue lies only in the place fixed by law for the performance of the act on which the accusation is based.

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located. But the union mailed to Washington not only the petitioner's affidavits, but those of the Board members for the several regional districts of the union throughout the country (R. 27-34, 48, 447, 453-55, 513, and 884-89).

[44]If, for example, the union's resident officer in Cleveland executed his affidavit there and sent it to Denver, from where it was mailed to Washington with the affidavits of the other union officers, would the government seek venue in Cleveland as well as in Denver and Washington? Compare with the present case *United States* v. *Cashin*, 281 F. 2d 669, wherein the government took the position (directly contrary to their posture here), in a prosecution for fraudulent securities sales under the Securities Act of 1933 (15 U. S. C. 77), that there was no venue in Alabama where the fraudulent scheme was formed and executed, but only in New York where the federal mails were subsequently used in furtherance of the scheme. The court's contrary decision, whether right or wrong, is inapplicable here since no place of performance was fixed by law in the Securities Act.

II.

PETITIONER'S MOTIONS FOR THE PRODUCTION OF GRAND JURY TESTIMONY WERE ERRONEOUSLY DENIED.

Two (Eckert and Mason) of the three Government witnesses testified in 1954 before the grand jury which indicted petitioner, and all three Government witnesses testified in 1956 before a grand jury in the same district which indicted the petitioner and 13 others for conspiracy to file false Taft-Hartley affidavits[45] (R. 273, 344, 448, 498, and 688). At the trial, after each of the three witnesses had completed his direct testimony, the defense moved that his testimony before the grand juries about the petitioner be produced directly to the defense or, if that motion were denied, to the trial judge *in camera*, for delivery to the defense in the event that the court's examination disclosed inconsistencies of testimony (R. 118, 131-40, 448, 487, and 677-78). The motions were denied when made, and again when renewed after cross-examination (R. 136-40, 414-36, 448, 487, 677-80, and 782-84).

The defense, it thus appears, asked that the secrecy of the grand jury proceedings be invaded only "discretely and limitedly" for the purpose of impeaching the prosecution witnesses. See *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 683. The two issues presented here are (1) whether the record shows such a "particularized need" as required production of the grand jury minutes to the defense in the interest of fair procedure, under the rule laid down in the *Procter & Gamble* case *supra*, and if not (2) whether the trial court erred in refusing to inspect the grand jury testimony of these witnesses *in camera*, to determine whether any part of it should be made available to the defense.

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[45] *Raymond Dennis et al.* v. *United States*, pending on appeal to the Court of Appeals for the 10th Circuit (Nos. 6451-59).

A. The Grand Jury Testimony of the Prosecution Witnesses Should Have Been Produced to the Defense for Use on Cross-Examination

The general principles governing production of grand jury testimony for use on cross-examination have recently been discussed and applied by this Court in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395. It was held there that grand jury minutes lie outside the scope of 18 U.S.C. 3500; that the defense has no absolute right to the production of such minutes, but should be given access when a "particularized need" is shown that "outweighs the policy of secrecy"; and that the defense need not, in order to establish such a need, make any preliminary showing of inconsistency between the witness' testimony on trial and his grand jury testimony.

The reasons which governed the decision in the *Pittsburgh Plate Glass* case have no application to the present one. There (360 U. S. at 399) the defense asserted a "right" to examine the testimony under "the rationale of" *Jencks* v. *United States*, 353 U. S. 657, on the bare ground that it "dealt with subject matter generally covered at the trial." Under these circumstances, this Court held that the defense in the *Pittsburgh Plate Glass* case had "failed to show any need whatever" for the grand jury testimony. In the present case, however, the defense addressed its argument to the trial court's discretion (R. 132-41, 414-36, 677-80, and 782-84), and made an extensive showing of the circumstances giving rise to the need for access to the grand jury testimony.[46]

[46]There was motion and argument with respect to each witness, both before and after cross-examination (R. 118, 131-40, 414-36, 448, 487, and 672-80). The most extensive argument, and the Court's fullest statement of reasons for denying the motions, followed the cross-examination of the witness Eckert (R. 414-36).

Denying the motions, the trial judge ruled that even a general showing of possible inconsistency would not suffice, and that grand jury minutes should not be made available unless the inconsistency (R. 436) "goes to the very basis of the matter". Furthermore, the trial judge sustained the prosecution's objections to questions put by the defense (R. 403-04, 530-35, 538, and 686-87) to the prosecution witnesses, the purpose of which was to ascertain whether or not they had testified to the grand jury with respect to particular episodes which they testified about at the trial—a ruling which was erroneous and prejudicial in itself, quite apart from its bearing on the matter of access to the minutes.

In both these respects, the trial judge's ruling was plainly contrary to this Court's holding in the *Pittsburgh Plate Glass* case, *supra,* that a preliminary showing of inconsistency is unnecessary, and that the defense should be allowed opportunity to establish "a particularized need". Affirming the judgment of conviction, the Court of Appeals was equally in error, for its opinion (R. 927-28, 269 F. 2nd at 945-46) is squarely based on the Court's belief that no showing of probable inconsistency had been made.

Since the trial court failed to exercise its discretion under proper standards, and refused to allow the defense to develop the basis for its request by appropriate questions to the witnesses, the conviction must be reversed whether or not a sufficient showing of "particularized need" appears on this record. In fact, however, the showing was more than ample.

This Court has not yet had occasion to specify the factors which a trial judge should take into account in weighing the defendant's showing of "particularized need" for grand jury testimony for use in cross examination.[47] Generally

[47]The *Procter & Gamble* case, in which the phrase was first used, involved a request by a defendant in a civil suit for wholesale access

speaking, it would appear that such access should be allowed, in the interest of fairness, whenever there is a reasonable possibility that comparison with the grand jury testimony may make possible a sharper evaluation of the witness' testimony at the trial.

In practice, of course, this principle must be applied with due regard to the reasons for which grand jury testimony is ordinarily held secret. These reasons, as recognized by this Court[48], are particularly important in the pre-trial stage in a criminal proceeding, or where there is a blanket request for a large amount of grand jury testimony.[49] However, after the grand jury's functions are completed, and a limited request such as the one here in question is made, "disclosure is wholly proper where the ends of justice require it." See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234.

In the present case, the need for access was both manifest and acute. It was undisputed that the defendant had been a member of the Communist Party, and had publicly resigned before signing the affidavits, and for that avowed

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to grand jury testimony, for use in the preparation of its case. Such circumstances, as this Court pointed out (356 U. S. at 683), bear no resemblance to the situation where, as here, the request is by a defendant in a criminal case, and is limited to the testimony of a prosecution witness who has testified at a public trial.

[48]See the *Pittsburgh Plate Glass* case, *supra*, at 399-400, and the *Procter & Gamble* case, *supra*, at p. 681 footnote 6. In the latter case, this Court cited with approval the reasons for grand jury secrecy as listed in *United States* v. *Rose*, 215 F. 2nd, 617, 628-9 (C. A. 3), wherein they are in turn derived from *United States* v. *Amazon Industrial Chemical Corp.*, 55 F. 2nd 254, 261 (D. Md.).

[49]None of the reasons given in *United States* v. *Rose*, *supra* footnote 48, has any application to cases such as the present one, except the general encouragement of "free and untrammeled disclosures" by grand jury witnesses. This policy is entirely sound, but of course it is of negligible weight where, as here, the request is limited to the testimony of particular witnesses who have already appeared in the public trial.

purpose. The issue before the jury was whether or not he had maintained a covert membership in or affiliation with the Party. The prosecution produced no evidence of continued payment of dues, attendance at meetings, or other normal attributes of membership. The evidence consisted entirely of statements allegedly made by the petitioner to one of the prosecution witnesses, invariably in the presence of no one else.

This is just the sort of evidence which courts have traditionally viewed with misgivings, because it is so easily fabricated, exaggerated, or colored. In the present case, much might depend on the exact words used by a witness in reporting one of these alleged "uncorroborated" admissions by the petitioner.

A good example is the testimony by Gardner (R. 443-45) about the conversation during an automobile trip from Port Colborne to Buffalo in the fall of 1951, during the course of which petitioner is supposed to have stated that his public resignation from the Party had been a mistake because "it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to the Taft-Hartley affidavits". Did Gardner describe this conversation to the grand jury? If so, did he use substantially the same words?[50] The comparison might well have assisted the jury in evaluating Gardner's testimony. The possibility of significant discrepancy is certainly not remote, for Gardner's description of the same episode in other proceedings has been significantly different. Testifying before the Subversive Activities Control Board, for example, Gardner attributed the belief that petitioner's resignation from

[50]The importance of checking the previous record on matters such as this is vividly illustrated by the Government's transmutation of the word "public", actually used by Gardner, to "formal" in describing this episode to this Court, as shown *supra*, p. 6 footnote 5.

the Party was not genuine, not to "the enemies of the Party" but to the American and Canadian "authorities".[51]

The same considerations apply to the other witnesses. All three testified to the petitioner's uncorroborated "admissions". All three were former employees of the employees of the petitioner's union, whose separation from it and subsequent activities (R. 26, 92-106, 437, 453-54, 474-86, 567-70, 733, and 745-49) involved circumstances indicative of prejudice and hostility toward the defendant. Eckert and Mason had testified on previous occasions, and there were inconsistencies in the testimony of each (R. 414-36, 782-83, and 929); Gardner had made no references, in his reports to the Federal Bureau of Investigation, to either of the two episodes which comprised all of his direct testimony at the trial. *Cf. Jencks* v. *United States*, 353 U. S. 657, 667.

In the light of the foregoing considerations, the petitioner's "particularized need" for the grand jury testimony of the three prior witnesses was abundantly shown. See *U. S.* v. *Zborowski*, 271 F. 2d 661, 666 (C. A. 2). Had the trial judge exercised his discretion in accordance with the applicable standards of criminal procedure, production of the testimony to the defense must have been held necessary in order to attain the ends of justice.

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[51] See *Rogers* v. *International Union of Mine, Mill & Smelter Workers*, SACB No. 116-56, typewritten transcript, p. 4884:

> "A. Travis told me that he was very happy that I could come with Mine-Mill, I had come well recommended from the Cleveland party, and we also discussed the problems of getting over the border, and he told me that he felt that one of main problems was his public resignation from the party at the time of his signing of the non-communist affidavits, and that he was quite convinced that neither the American nor the Canadian authorities believed his resignation was genuine, and as a result he had had this difficulty in getting over the border."

B. If Not Produced Directly to the Defense, the Grand Jury Testimony Should Have Been Preliminarily Examined by the Trial Court in Camera

In the *Pittsburgh Plate Glass* case, *supra*, the petitioners claimed error because the trial judge failed to examine the grand jury minutes for inconsistencies. This Court did not pass on that claim (360 U. S. at 401) ". . . because petitioners made no such request of the trial judge". In the present case such a request was made (R. 136, 414, 487, 677-78, and 782), and accordingly this record presents the issue reserved in the *Pittsburgh Plate Glass* case.

There is no question but that, under the practice of the Court of Appeals for the Second Circuit, petitioner's request that the trial court examine the grand jury testimony of the prosecution witnesses would have been granted. Under that practice, examination of the grand jury testimony by the trial judge is automatic, when the defense suggests the possibility of inconsistency between the trial testimony and the grand jury testimony. Refusal of a request for examination *in camera* would be erroneous, for the reasons set forth in *United States* v. *Zborowski*, 271 F. 2nd 661, 665 (C. A. 2):[52]

> "For many years it has been the unvarying practice in this Circuit to permit defense counsel to use inconsistent grand jury testimony for impeachment

[52] See also *United States* v. *McKeever*, 271 F. 2nd 669, 672 (C. A. 2): "In this Circuit the procedure whereby grand jury testimony may be made available to the defense is well established. After a government witness has testified on direct examination, if there appears to be some basis for supposing that his grand jury testimony may be at variance with his trial testimony, the defense may ask the trial judge to examine the witness' grand jury testimony. If the trial judge finds any material discrepancy between the trial testimony and the grand jury testimony, such part of the minutes is made available to the defendant. *United States* v. *Spangelet*, 2 Cir., 1958, 258 F. 2d 338."

purposes. The rule is that when the defendant points out a possible inconsistency between the trial and the grand jury testimony of a government witness and requests the trial judge to examine the witness' grand jury minutes, the trial judge must then read the minutes *in camera*. Finding any substantial discrepancy, he must make available to the defendant the minutes or an intelligible segment thereof containing the inconsistency. But where the trial judge finds no such inconsistency, he should, upon request, seal the grand jury testimony so that it is available on appeal. United States v. Spangelet, 2 Cir., 1958, 258 F. 2d 338; United States v. Angelet, 2 Cir., 1958, 255 F. 2d 383; United States v. H. J. K. Theatre Corp., 2 Cir., 1956, 236 F. 2d 502, certiorari denied Rosenblum v. United States, 1957, 352 U. S. 969, 77 S. Ct. 359, 1 L. Ed. 2d 323; United States v. Alper, 2 Cir., 1946, 156 F. 2d 222."

In *Jencks* v. *United States*, 353 U. S. 657, this Court disapproved the practice of *in camera* examination, for the discovery of inconsistencies, of a prosecution's witness' prior statements to Government agents, and ruled that such a statement should be made available to the defense, which alone (353 U. S. at 668) ". . . is adequately equipped to determine the effective use for purpose of discrediting the Government's witnesses and thereby furthering the accused's defense . . ." However, the *Jencks* case did not deal with grand jury testimony[53], and we suggest that the considerations with respect to *in camera* examinations are not entirely parallel as between grand jury minutes and prior statements to Government agents.

The three factors chiefly considered in the decisions in this field are authenticity, materiality, and secrecy. The first of these is of importance in connection with prior

[53]See *United States* v. *Pittsburgh Plate Glass Co.*, 360 U. S. 395, 398.

statements to Government agents, for these may not have been recorded with sufficient accuracy to justify their use for purposes of impeachment.[54] But the factor of authenticity has no application to grand jury testimony, which is stenographically recorded and as accurate as any record is likely to be.

The factor of materiality is necessary in order to keep requests for prior statements or grand jury testimony within the bounds of what is reasonably necessary for the administration of justice. Where the request is not unwieldy, however, there is no particular danger in making immaterial statements or testimony available to the defense, unless the factor of secrecy is also involved. There are policies of secrecy with respect to both statements to Government agents and grand jury testimony, but they are by no means identical.

With respect to statements to Government agents, the policy of secrecy is based primarily on the need for concealing the identity of Government informers, and protecting other persons mentioned in the statements from unnecessary embarrassment. If the statement falls within the scope of 18 U. S. C. 3500 and is relevant to the testimony given by the witness on direct examination, the policy of secrecy gives way to requirements of due process, and the statement must either be made available to the defense, or the witness' testimony is stricken or a mis-trial is declared. However, the factor of secrecy is important enough to justify a preliminary *in camera* examination by the trial court, for the excision of irrelevant portions in accordance with 18 U. S. C. 3500.

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[54]It is for this reason that 18 U. S. C. 3500(e) limits the type of statements which must be produced to the defense to those which are written or embodied in "a substantially verbatim recital of an oral statement".

The policy of secrecy for grand jury minutes rests upon more numerous and diverse reasons[55] than the policy with respect to statements to Government agents. Most of these are inapplicable when a grand jury witness is subsequently called to testify at the trial. Nevertheless, such testimony may contain irrelevant portions, and may mention innocent bystanders to their unnecessary embarrassment. Or it may be interspersed with grand jurors' questions or comments, or observations by state attorneys, which perhaps should not be disclosed. Or the grand jury testimony may have been taken as the basis for a different indictment, in which event still other considerations come into play.[56]

It is unnecessary to decide, in the present case, whether or not under any circumstances the policy for secrecy of grand jury testimony might justify withholding material and relevant grand jury testimony of a prosecution witness, and denying the defense access to such testimony for use on cross examination.[57] Certainly, however, the secrecy policy may well justify a preliminary examination of grand jury testimony *in camera*, for the elimination of irrelevant and immaterial testimony. Ordinarily the prosecution will know

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[55] *Supra*, p. 33 and footnote 48.

[56] For example, Gardner's grand jury testimony was not given in connection with the present case, but in support of the indictment in *Dennis* v. *United States*, *supra* p. 30 footnote 45, in which the petitioner is one of fourteen defendants. In colloquy before the trial court in the present case, prosecution counsel charged (R. 425) that the request for Gardner's testimony was "a fishing expedition to prepare for the trial of the fourteen defendants". As appears *supra*, pp. 34-35, there was a very particular need for Gardner's testimony for use on cross examination in the present case. However, assuming for purposes of argument that there was a basis for the prosecution's concern about a "fishing expedition", adequate protection against this would be furnished by preliminary *in camera* examination, and the elimination of irrelevant portions.

[57] Certainly in the event that *in camera* inspection should disclose substantial inconsistencies, such a withholding might raise serious questions of due process.

well enough whether the entire testimony of one of its witnesses may properly be turned over to the defense, or whether there are circumstances requiring a preliminary *in camera* examination.

The practice in the Court of Appeals for the Second Circuit appears to have developed in line with the foregoing principles. When the defense requests the grand jury testimony of a prosecution witness, the Government may voluntarily make the witness' entire grand jury testimony available. See *United States* v. *Stromberg*, 268 F. 2d 256, 273 fn. 16. If the prosecution opposes the request, the trial court examines the grand jury testimony *in camera*, and turns over to the defense such portions as appear to contain inconsistencies. A refusal to examine, on the part of the trial court, is erroneous and requires reversal of the conviction. *United States* v. *Hernandez*, F. 2d (August 24, 1960). Such portions of the testimony as are not made available to the defense, are sealed with the record so as to be available for review on appeal. *United States* v. *Zborowski, loc. cit. supra*. That there are many advantages to such a procedure sufficiently appears from the circumstance that in three recent cases the Court of Appeals has found inconsistencies in the testimony which escaped the attention of the trial judge, and has reversed the judgments of conviction on that ground. *United States* v. *Zborowski, supra*; *United States* v. *McKeever, supra*; *United States* v. *Spangelet, supra*.

It is suggested, however, that the procedure of the Court of Appeals for the Second Circuit is erroneous in one important particular. Under the principles enunciated in the *Jencks* case, *supra*, the purpose of discovering inconsistencies is not sufficiently served by examination *in camera*, but requires for its fulfillment examination by counsel charged with the defense of the case. See *Jencks* v. *United States*,

353 U. S. at 669; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. at 407-10 (dissenting opinion). For these reasons it would appear that the purpose of the *in camera* examination should not be to discover inconsistencies, but rather to eliminate irrelevant and immaterial testimony, and take such further precautions as may be necessary in accordance with the applicable reasons for maintaining the secrecy of grand jury testimony.

In the present case, however, none of these things were done. The prosecution opposed *in camera* examination of the grand jury minutes as vigorously as it opposed the direct delivery of those minutes to the defense. Neither the prosecution nor the trial court made any effort to determine whether there were inconsistencies in the grand jury testimony, and the trial court sustained objections to all efforts by the defense to strengthen its showing of particularized need by questions to the prosecution witnesses. Under all these circumstances, the judgment below must be reversed.

III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JUDGMENT OF CONVICTION

At the trial and in the court below, petitioner unsuccessfully urged that the evidential requirements applied in perjury trials are equally applicable here. Even if the Court should reject this contention, however, the evidence was insufficient to support the conviction, and petitioner's motion to dismiss should have been granted.

A. The Evidential Requirements of Perjury Are Applicable to this Case

Under the decisions of this Court, the federal courts continue to apply the common law requirements with respect to the *quantum* of proof in perjury cases. Under those

requirements, a conviction for perjury cannot stand unless either (a) two or more witnesses testify that the alleged perjurious statement was false, or (b) one witness so testifies, and there is corroborative evidence.

From time to time the rule has been criticized, and fifteen years ago the government asked this Court to discard it. *Weiler* v. *United States*, 323 U. S. 606. The matter was fully considered, and the Court unanimously rejected the proposal, on the ground that the perjury rule was long-established and the government had not shown sufficient reason for its abandonment.

The government has not, in the present case, renewed its challenge to the validity of the rule itself. But it contends, and the court below held, that the rule does not apply to false-affidavit prosecutions under the Taft-Hartley law or, indeed, to any cases under 18 U. S. C. 1001. It is true that two other courts of appeals have reached the same conclusion as the court below.[58] However, there has been sharp division of opinion among the circuit judges,[59] and Judge Murrah's dissent in the court below was based on this point (269 F. 2d at 946, R. 928-29) as well as on the trial court's refusal to examine the grand jury testimony.

The "false statement" statute, 18 U. S. C. 1001, applies to unsworn as well as sworn statements. For this reason, it might be argued in other types of prosecutions under this provision that the perjury rule is not applicable.[60] But it is unnecessary to decide that question here, for under Section 9(h) of the Taft-Hartley law, the provisions of 18

[58] *United States* v. *Killian*, 246 F. 2d 77, 82 (C. A. 7), rev'd on other grounds, second conviction aff'd 275 F. 2d 561, pending here on pet. for cert. No. 141 this term; *Fisher* v. *United States*, 231 F. 2d 99, 105-06 (C. A. 9). The court below had previously so held in *Sells* v. *United States*, 262 F. 2d 815, 821-22 (C. A. 10).

[59] This question, among others, was presented in *Gold* v. *United States*, 237 F. 2d 764 (C. A. D. C.), reversed on other grounds 352 U. S. 985. The Court of Appeals affirmed the conviction by an equal division; Judge Bazelon alone wrote an opinion, in which he took the view that the perjury rule was applicable. 237 F. 2d at 765-67.

[60] There appear to be no other cases under 18 U. S. C. 1001 in which the question has arisen.

U. S. C. 1001 are expressly made applicable to "affidavits" filed with the National Labor Relations Board.

Since an affidavit by definition is a sworn statement, this and other prosecutions based of affidavits filed pursuant to Section 9(h) are prosecutions for false swearing. The fact that it is not a prosecution for perjury in the common-law sense is irrelevant, since false swearing in an affidavit filed with the Board is the gist of the offense. The evidential rules applied in perjury trials are equally applicable here, just as this Court held them applicable in a prosecution for subornation of a false oath in bankruptcy. *Hammer* v. *United States*, 271 U. S. 620. Indeed, in the *Douds* case Chief Justice Vinson referred to the offense for which this petitioner has been indicted as "false swearing" (339 U. S. at 411), and Justices Frankfurter and Jackson referred to it as "perjury" (339 U. S. at 420 and 436).

The government's principal argument to the contrary is that this case falls within the exception to the perjury rule where the alleged falsity relates to a "subjective" matter. For example, where it is charged that the accused falsely declared that he *saw* or *remembered* something, the courts have said that such matters, being incapable of direct proof, may be shown by circumstantial evidence.[61]

But petitioner's membership in or affiliation with the Communist Party is not a subjective matter. Of course, state of mind enters into the status of membership or affiliation, as this Court has pointed out.[62] Nevertheless, there must be overt manifestations of membership or affiliation, and in the *Douds* case this Court clearly expressed

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[61] *Behrle* v. *United States*, 100 F. 2d 714, 715 (C. A. D. C.); *People* v. *Doody*, 172 N. Y. 165, 172, 64 N. E. 807, 808 (1902); *Regina* v. *Hook*, 27 L. J. M. C. 222, 169 Eng. Reprint 1138 (Ct. Crim. App. 1858).

[62] *Galvan* v. *Press*, 347 U. S. 522; *Bridges* v. *Wixon*, 326 U. S. 135; *Jencks* v. *United States*, 353 U. S. 657, 679 (concurring opinion of Mr. Justice Burton).

the view that membership and affiliation are capable of direct proof. In fact, it was recognition that the issue of *belief* in unlawful violence is *not* susceptible of direct proof, and must be proved circumstantially, that was chiefly responsible for the sharp and equal division within the Court on the constitutionality of that portion of Section 9(h) relating to belief. Thus, Chief Justice Vinson wrote (339 U. S. at 410-11):

> "In proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial. Proof that one lied in swearing that he does not believe in overthrow of the Government by force, on the other hand, must consist in proof of his mental state. To that extent they differ.
>
> "To state the difference, however, is but to recognize that while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does."

And in his opinion concurring in part Justice Jackson drew the same distinction (339 U. S. at 436):

> "The only sanction prescribed, and probably the only one possible in dealing with a false affidavit, is punishment for perjury. If one is accused of falsely stating that he was not a member of, or affiliated with, the Communist Party, his conviction would depend upon proof of visible and knowable overt acts or courses of conduct sufficient to establish that relationship. But if one is accused of falsely swearing that he did not believe in something that he really did believe, the trial must revolve around the conjecture as to whether he candidly exposed his state of mind."

These statements are a sufficient answer to the government's view that "requirement of direct proof is require-

ment of the impossible."[63] As Justice Jackson put it, membership or affiliation can be proved by "visible and knowable acts or courses of conduct."[64] This is just the sort of issue to which the perjury rule has always been applied, and accordingly it is properly applicable in the present case.

B. If the Perjury Requirements are Applicable, the Judgment of Conviction Must be Reversed

Assuming the perjury rule to be applicable, the mechanics of its use at a trial are well settled. Upon motion to dismiss, if the defense claims that the requirements have not been met, the judge must determine whether there is sufficient direct, or direct and corroborative, evidence to satisfy the rule, in the event that the jury believes the evidence. If the judge cannot so determine, the defendant must be acquitted.[65] If he does so determine and the case goes to the jury, the court must, on proper request, instruct the jury in the requirements of the rule, and direct them to acquit the defendant in the event they do not find sufficient credible evidence to satisfy the rule. See *Weiler* v. *United States*, 323 U. S. 606, 610.

In the present case, the trial court did neither of these things. Petitioner, in moving for a judgment of acquittal,

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[63]See *Sells* v. *United States*, 262 F. 2d 815, 822 (C. A. 10), quoted and relied on in the government's Brief in Opposition to the petition for certiorari in this case, at p. 12. In that case, the defense failed to request that the jury be instructed in accordance with the perjury rule.

[64]See also *United States* v. *Neff*, 212 F. 2d 297 (C. A. 3); *United States* v. *Remington*, 191 F. 2d 246 (C. A. 2). *Cf. Hupman* v. *United States*, 219 F. 2d 243 (C. A. 6), in which the government produced two witnesses who gave direct testimony of the defendant's attendance at Party meetings. The court's reference (219 F. 2d at 247) to "circumstantial evidence" relates not to the issue of falsity, but to the issue whether the defendant signed and filed the alleged affidavit.

[65]See *United States* v. *Neff*, 212 F. 2d 297, 306 (C. A. 3); *United States* v. *Rose*, 215 F. 2d 617, 625 (C. A. 3).

expressly relied on the perjury rule (R. 807, Tr. 1114). Later, he requested that the jury be instructed in accordance with the rule (R. 828). However, in the view of the trial judge the perjury rule was not applicable, and accordingly he took no account of it in ruling on the motion for an acquittal (R. 822, Tr. 1114), and refused to instruct the jury in accordance with the rule (R. 831).

It follows that if the rule is applicable, the conviction must be reversed. Under these circumstances it is superfluous to add that, since (as the court below observed, R. 911) the government's case is circumstantial, and direct evidence is wholly lacking, the evidence fails to meet the requirements of the rule. The government has said nothing to the contrary.

C. The Rule against Conviction Based on Uncorroborated Admissions was Violated

Conviction may not be based on uncorroborated extrajudicial admissions of the accused made after the alleged commission of the offense. Such admissions, like confessions, are so untrustworthy that they are, in themselves, insufficient to warrant a finding of guilt. *Opper* v. *United States*, 348 U. S. 84.

Petitioner's conviction violates the rule enunciated in the *Opper* case. As has been seen (*supra*, pp. 4-5), it was undisputed at the trial that petitioner had been a member of the Communist Party, and had publicly resigned from the Party in 1949. The only issue for determination by the jury was whether or not the petitioner had maintained (or re-established) a clandestine membership in or affiliation with the Communist Party, which extended to the times when the allegedly false affidavits were signed, in December 1951 and 1952.

The government's evidence, offered to show that a clandestine relationship persisted, consisted entirely of "admissions" which petitioner supposedly made in the course of conversations with the witnesses Gardner and Mason. In fact the statements in these conversations were entirely consistent with innocence. But even if they had contained admissions that petitioner was a member of or affiliated with the Communist Party when the affidavits were executed, the admissions would be insufficient unless corroborated.

There was no corroboration. First, there was no evidence whatsoever of any other occurrences subsequent to the filing of the 1951 affidavit which could give rise to an inference of membership or affiliation at or after that time. Second, there was nothing in the evidence of events prior to the execution of the 1951 affidavit which corroborates the post-affidavit admissions.

The government contends[66] that "petitioner's admissions were amply corroborated by the extensive evidence of his activities as a Party member." But this evidence, emanating exclusively from Eckert, related entirely to petitioner's activities prior to Eckert's separation from the Party in 1948. Accordingly, it cannot possibly serve to corroborate evidence offered to show that petitioner was still a member of the Party at the time he signed the affidavits.

The government also contends that the rule of the *Opper* case applies only to admissions made to law-enforcement authorities. It is true that the admission in the *Opper* case was made to agents of the Federal Bureau of Investigation.[67] However, the rationale of the decision is not so

[66]Brief of the United States in Opposition to the Petition for Certiorari, p. 15.

[67]In *Smith* v. *United States*, 348 U. S. 147, decided on the same day as the *Opper* case, the Court applied the rule against conviction based on uncorroborated admissions in a tax case, where the accused's statements had been made to Federal tax agents. The opinion states

limited. On the contrary, the theory upon which the opinion proceeds is inconsistent with any such limitation, for the Court stated (348 U. S. at 89-90) that not only "the zeal of the agencies of prosecution", but also "the self-interest of the accomplice, the maliciousness of an enemy, or the aberration or weakness of the accused under the strain of suspicion" might "tinge or warp the facts of the confession", to such an extent that it could not serve as the sole basis for a conviction. There do not appear to be any cases supporting the distinction urged by the government; on the contrary, there are at least two decisions in which the corroboration requirement has been applied, without discussion, although the admissions were made to private individuals. *United States* v. *Carminati*, 247 F. 2d 640, 644 (C. A. 2), cert. den. 355 U. S. 883; *United States* v. *Nystrom*, 237 F. 2d 218, 225 (C. A. 3)

The record in this case is entirely barren of any evidence that the petitioner commited the crime of which he is charged, except testimony by two of his enemies, relating conversations that took place years earlier. The requirement of corroboration is especially necessary in cases of this type, and a conviction which rests on evidence so frail and freighted with bias and interest may not be permitted to stand.

D. Without Reference to the Foregoing Evidential Requirement, the Evidence is Insufficient to Sustain the Conviction

The evidence that petitioner was a member of or affiliated with the Communist Party in December 1951 or De-

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that (at p. 155) the rule should be applied "... . at least where, as in this case, the admission was made after the fact to an official charged with investigating the possibility of wrong doing . . . ", but there is no indication that the Court would have come to a different conclusion had the admission been made to a private person.

cember 1952 was plainly insufficient, even if the perjury rule and the rule against conviction based on uncorroborated admissions are deemed inapplicable. The extensive evidence of petitioner's activities in the Communist Party from 1942 to 1948 is insufficient, for reasons that have already been stated. And there is no proof that in 1951 or 1952, or at any time following his public resignation from the Party, petitioner attended Party meetings, or paid dues or made other financial contributions to the Party, or that the Party considered him or that he considered himself bound by Party decisions or discipline in any way.

The only evidence pertinent to the crucial issue in the case, accordingly, is the testimony of Gardner and Mason about their conversations with the petitioner during or subsequent to the period covered by the affidavits. Even when viewed in a light most favorable to the government, this post-affidavit evidence contains little which even tends to prove the charge, and is plainly insufficient to support the judgment of conviction.

The conversations in the course of which these admissions supposedly were made are set forth in the opinion below (R. 908, 910). In his dissent, Judge Murrah described this evidence (269 F. 2d at 946 R. 928) as "indeed indirect and circumstantial and, in my judgment inconclusive". An analysis of this evidence bears out his opinion.

At most, petitioner's admissions in the five conversations tend to show that he may have been in sympathy with Communist trade union policy, that he had respect for the Party and was occasionally influenced by the Party or Party members, and that he had sporadic contact with Party members. No more than this can be concluded from what petitioner said to Mason in March 1952 about his role in rejecting the notion of a third labor federation. Petitioner's reference to "us Communists" in his talk with

Mason in March 1953 apparently meant no more than that as an acknowledged member who had withdrawn from the Party only because of 9(h), he would be a target of public attack and of legislation like the McCarran Act. Petitioner's advice to Gardner in June 1953 about the situation in the Communist Party in Idaho, fairly construed, shows no more than that he knew what was going on there and wished to keep the union and Gardner clear of the dangers of being involved in the Party's factional dispute. Finally, Mason's rambling testimony of his two talks with petitioner in the summer of 1953 show, at most, that the latter was still aligned with the so-called left wing group in the union.

Even if the most damaging construction is put on this testimony and the most damaging inferences drawn from it, the evidence is insufficient to prove membership or affiliation. Petitioner may have talked like a Communist and may even have referred to himself as one. It might be that the evidence tends to show continued "belief" in the Party. The charge, however, was membership and affiliation, not belief, and the element of mutuality which lies at the heart of both relationships is not shown by the evidence.

Lacking any proof of Party connection or activity of any sort, the evidence was manifestly insufficient to go to the jury. Even if assumed to be true, these snatches of conversation show nothing more than sympathy with some of the Party's aims—a sympathy which petitioner openly proclaimed at the time of his resignation. Such evidence is no proof of continuing membership or affiliation, and the conviction must be set aside.

IV.

PETITIONER WAS DENIED A FAIR TRIAL BY THE COURT'S RULINGS WITH RESPECT TO THE ADMISSION AND EXCLUSION OF EVIDENCE, AND THE APPLICATION OF 18 U. S. C. 3500

The trial court, over objection, received testimony of the witness Eckert which was irrelevant and incompetent and highly prejudicial. The court likewise refused to permit cross-examination of the three prosecution witnesses in order to show that one (Mason) was fearful of adverse government action because of his former Communist Party membership, and that the other two, as employees of rival unions, were biased against the petitioner and his union. Furthermore, the trial court's interpretation and application of 18 U. S. C. 3500 were erroneously and prejudicially limited.

A. Prejudicial Evidence was Erroneously Admitted

Over objection and after extensive argument (R. 107-117) the court permitted the witness Eckert to give the following testimony (R. 117-18):

> "Q. Mr. Eckert, from your experience in the Communist Party and from your membership in the Communist Party during the period from 1931 until the time you left the Party in 1948 do you know whether or not there was a Party policy on resignation from the Communist Party? . . .
>
> "A. Yes.
>
> "Q. And will you state what the policy of the Party was in that respect?
>
> "A. The policy of the Party was that once having joined the Communist Party you could not leave without being expelled."

The prejudicial effect of this testimony is plain enough for, since it was admitted that Travis was a member of the

Communist Party until 1949, the jury might be led to infer that he *could not* have resigned at that time, because of the contrary Party policy. Indeed, on summation the prosecution urged the jury to draw that very conclusion.[68]

But the conclusion is an untenable one, and the testimony was inadmissible (on grounds of both competence and relevance) for the purpose for which it was offered. Testimony that the Communist Party had a policy against "recognizing" resignations does not establish that the petitioner (or any other member) could not resign.[69] In the *Douds* case (339 U. S. at 414) this Court specifically ruled to the contrary, and upheld the constitutionality of Section 9(h) on the very ground that a union official who was a member of the Communist Party could resign his membership and sign the affidavit. Commenting on similar testimony given in the *Gold* case, Judge Bazelon pointed out (237 F. 2d at 772):

> "If no one can effectively resign from the Party, no union officer with appellant's history can ever comply with §9(h), and the statutory phrase 'is not

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[68]Tr. 1168-69 and especially 1210, where prosecution counsel, after referring to Eckert's estimony, told the jury. "In other words, once you join the Communist Party you remain a member of the Communist Party unless you are expelled. One may drop out, he may quit paying dues, not attend meetings and so forth, and as far as the individual is concerned he may consider himself out of the Party but not so far as the Communist Party is concerned. . . . Now, the fact that one cannot resign from the Communist Party makes the procedure followed by Travis in this so-called resignation statement utterly ridiculous."

[69]The testimony flies in the face of authoritative data showing that the history of the Communist Party in this country has always been characterized by wholesale separations. Hoover, *Master of Deceit* (1958) p. 5 and chap. 9; Howe and Coser, *The American Communist Party* (1957) pp. 528-29. In 1952, it was estimated, in a study of ex-Communists in the United States, that there were more than 700,000 such. Ernst and Loth, *Report on the American Communist* (1952) p. 14.

> a member' is precisely equivalent to 'has never been a member'. This possibility Douds specifically rejects."

The government[70] supports the admission of this testimony on the ground that it was probative of the Party's "acceptance" of the petitioner as a member. But the testimony was neither offered nor received for that purpose, and the court below correctly pointed out that (R. 913)[71] "without more" this evidence ". . . could show nothing of the state of mind of the defendant and could not show that he did not, in fact, resign from the Party on the date he claimed."

The court below approved admission of the testimony on the ground that (R. 915) it was "relevant in the interpretation of the defendant's statements and behavior". Plainly, however, the evidence was incompetent and irrelevant for this purpose unless the petitioner knew of and accepted the Party's alleged policy, and petitioner requested that the jury be so instructed (R. 896). The instruction was refused, and this ruling was approved below on the ground (R. 913) that there was "related evidence" from which "the jury could properly infer that the defendant continued to act in obedience to this policy and that his resignation was understood to be in form only. . . ."

However, there would be no basis for such an inference unless there was evidence that the petitioner knew of and accepted the policy. The trial court recognized this and initially received the testimony subject to connection by means of other evidence (R. 114). On subsequent motion to strike the testimony (R. 785), the court ruled that there was sufficient evidence of connection to send the question of

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[70]Brief in Opposition to Certiorari, pp. 14-15.

[71]The government (*ibid.*) misread the opinion below; its error is due to omitting from the sentence it quotes, the portion quoted in the text above.

petitioner's knowledge of the policy to the jury (R. 790). Assuming the ruling was correct, the instruction should certainly have been granted, for if the jury was not satisfied that petitioner knew of the policy, the testimony could not be treated as evidence against him. Therefore, the court below erred in approving the refusal of the requested instruction, regardless of the sufficiency of the evidence of knowledge.

But in fact there was no evidence that petitioner knew of any such policy as Eckert testified to. The court below (R. 914-15) and the trial court (R. 790) so regarded the testimony that petitioner knew of the discussion in Party circles about the Taft-Hartley law, and the policy problem of compliance or non-compliance. But this testimony in no way tends to establish petitioner's knowledge of a general Party policy, dating back years prior to the Taft-Hartley law, against leaving the Communist Party other than by expulsion.

Finally, Eckert's testimony was incompetent on grounds of lack of foundation and remoteness. It was offered and received as expert testimony,[72] but it wholly lacked any factual support. Even more important, it related only to the period up to 1948 when Eckert left the Party, whereas petitioner resigned in 1949 and did not sign the first of the two affidavits until December, 1951.

The remoteness is more than merely temporal, both with respect to the existence of the policy and petitioner's knowledge thereof. The prosecution's case was built on the theory that in 1949 the Communist Party changed its policy with respect to compliance with the Taft-Hartley law, and that petitioner's resignation was in accord with the new compli-

[72]The court below thought otherwise (R. 915), but the record plainly shows that the trial court received Eckert's testimony as the opinion of an expert (R. 113-14 and 789), and so described it to the jury in his charge (R. 858-59, 874).

ance policy.[73] Assuming that in 1948 there was a pre-existing Party policy against recognizing resignations, there is no basis for presuming that it continued through 1949 to 1952, despite such a profound change in the circumstances as the Taft-Hartley law brought about.

For all these reasons, Eckert's "can't resign" testimony was incompetent and irrelevant, and its receipt in evidence was prejudicial error. Even if properly received, the trial court's refusal to instruct the jury to disregard the testimony unless satisfied that petitioner knew of and accepted the policy, was prejudicial error.

B. Cross-examination of Prosecution Witnesses Was Erroneously and Prejudicially Restricted

The trial court refused to permit the defense to show, by cross-examination, that Mason's testimony for the prosecution was affected by his fear of denaturalization and deportation, and that the testimony of Eckert and Gardner against petitioner was affected by interest, in that both were officials of unions competitive with and hostile to petitioner's union.

1. *Mason*—Mason came to this country from Yugoslavia in 1923 and was naturalized in 1938 (R. 738-40). He had been a member of the Communist Party in the 1930's, before his naturalization (R. 738). The defense sought to show that he had been interrogated in 1952 by the Immigration and Naturalization Service about his past membership in the Communist Party; that he was fearful that he might be denaturalized and deported and that he had sought advice about his status; and that, because of this

[73]This was the thrust of petitioner's public statement at the time of his resignation, and of his alleged statements to the witness Mason, on which the government and the court below principally rely (R. 906 and 914).

fear, he became an informant for the FBI and a witness against petitioner following his interrogation by the Immigration and Naturalization Service (R. 738-44).

The trial judge ruled that this line of interrogation was not permissible unless the defense could also show that the government had actually made a threat or a promise to Mason related to his status as a naturalized citizen (R. 742-44). The court below, on the other hand, upheld the ruling of the trial judge on the ground that Mason, as a naturalized citizen, was not subject to deportation, and that he could not be denaturalized because, since he had revealed his past Communist Party membership when he was naturalized in 1938, he had not committed fraud (R. 918).

Neither basis is tenable. To say that Mason could not legally be denaturalized or deported does not meet the issue. Even if, as a matter of law, Mason could not be denaturalized or deported, a threat which he feared might still have been made. Furthermore, he himself had been in doubt whether the 1950 statute applied to him, and had sought advice about the matter.

Aside from any threat or promise, therefore, the defense was entitled to show that Mason had demonstrated his concern about his status under the 1950 statute. Mere hope or belief on the part of a prosecution witness that he may profit by testifying for the government, even if there is no objective basis for his hope or belief, bears on his credibility. *Parkas* v. *United States*, 2 F. 2d 644, 647 (C.A. 6); *Spaeth v. United States*, 232 F. 2d 776, 779 (C.A. 6); 62 ALR 2d 610. (listing comparable state court decisions at 639-42). The fact that Mason was interrogated in 1952, even though his status as a citizen was secure, and the fact that it was only a short time later that he became an informant for the FBI and a witness against petitioner and Mine, Mill[74] tends

[74]The Service interrogated Mason in February, 1952 (R. 739). Thereafter, he became an informant for the FBI, apparently some-

to support an inference that he hoped or believed that by cooperating with the government, he would shield himself from unpleasant consequences.

2. Eckert and Gardner—The trial court also erred in ruling that the defense could not show, in cross-examining Eckert and Gardner, that the labor organizations of which they were officials were sharp and unfriendly rivals of petitioner's union.

At the time he testified, Eckert was assistant director of the Die Casting Department of the United Automobile Workers (R. 26). He had been associated with that union since 1948, shortly after he had left petitioner's union, at which time he led some local unions out of Mine, Mill and into the U. A. W. (R. 355). The trial court did not allow the defense to show, by cross-examining Eckert, that the U. A. W. had been Mine, Mill's principal competitor in the East since 1948 and that the two organizations had opposed each other in many Labor Board elections (R. 354-56).

Gardner has been an official of the International Hod Carriers, Building and Common Laborers Union of America since January, 1956, a few months after he had been discharged by petitioner's union (R. 437, 568). After the defense, without objection, had asked Gardner several questions about the competition between the Hod Carriers and Mine, Mill (R. 567-70), the trial court, *sua sponte,*

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time in 1953 (R. 681-82), when he was still a member of the Mine, Mill Executive Board (R. 453). He made his first appearance as a witness against petitioner and Mine, Mill in 1954 in the Labor Board proceeding to decomply Mine, Mill which this Court held to be unauthorized in *Leedom v. International Union of Mine, Mill and Smelter Workers,* 352 U. S. 145 (R. 685). In 1955, Mason testified against petitioner on the latter's first trial on this indictment (R. 685).

cut off this line of interrogation (R. 569-70) and then, after colloquy, instructed the jury to disregard the testimony the witness had already given on the subject (R. 659).

Both the trial court (R. 630-31) and the court below (R. 918-19) held that evidence of the rivalry of the unions was too remote to have a bearing on the bias and credibility of the witnesses. The court below acknowledged that a witness in a civil case may be cross-examined as to his bias and interest by reason of his employment relationship with a party,[75] but concluded that in a criminal case, where an individual and not the union was the defendant, the rivalry between the unions had "only a slight and indirect bearing" on the credibility of the witnesses (R. 919).

The distinction drawn by the court below is artificial and unrealistic. Petitioner filed the allegedly false affidavits as secretary-treasurer of Mine, Mill. A conviction of a national officer of a union on a charge such as this is obviously a serious blow to the standing and prestige of the union and may be exploited by its rivals. Nor do the decisions support a distinction between civil and criminal pro-

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[75]The court cited (R. 919) *Central Truck Lines* v. *Lott*, 249 F. 2d 722 (C. A. 5), where the witness testified for his employer; *Majestic* v. *Louisville and N. R. Co.*, 147 F. 2d 621 (C. A. 6), where the employer of the witness had an interest in the recovery; *Lexington Glass Co.* v. *Zurich etc. Ins. Co.*, 271 S. W. 2d 909 (Ky. App.), where the witness was employed by the law firm representing the party for whom he testified; *Manley* v. *Northumberland County*, 32 F. Supp. 775 (M. D. Pa.), where the employer of the witness was a competitor of the party against whom the witness testified; and its own decision in *Theurer* v. *Holland Furnace Co.*, 124 F. 2d 494, where the witness was an adjuster for a group of fire insurance companies, with a possible interest in a suit for damages for negligent installation of a furnace. In *Atlantic Coast Line R. Co.* v. *Dixon*, 207 F. 2d 899, 904 (C. A. 5), it was held that the plaintiff could show, by cross-examination of a foreman, that testimony contrary to that which he gave on direct would subject him to criticism by the defendant railroad.

ceedings or between the directness or indirectness of the interest of the witness.[76]

In *Napue* v. *Illinois*, 360 U. S. 264, this Court said (at 269):

> "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend".

In this case, "the truthfulness and reliability" of the witnesses were particularly important matters to explore because the witnesses had not been mere spectators of the events they described from the witness stand but had been deeply involved in them and because the testimony of each was crucial to the government's case. The restrictive rulings of the trial court, therefore, constituted highly prejudicial error.

C. The Trial Court's Application of 18 U. S. C. 3500 Was Erroneously and Prejudicially Limited

In its interpretation and application of 18 U. S. C. 3500, the trial court erred in two important respects. The first

[76] In civil cases, an employment relationship as bearing on bias and interest need not be with a party. Thus, in *Lexington Glass Co.* v. *Zurich etc. Ins. Co.*, 271 S. W. 2d 909 (Ky. App.), a party was permitted to show that the witness was an employee of the law firm representing the opposing party; and the court below has had occasion to say that a witness may be cross-examined about his membership in an organization to which one of the parties belongs or as to whether he and the opposite party are adherents of rival political factions. *Ice Way Motor Freight, Inc.* v. *True*, 165 F. 2d 38, 41. In criminal cases, it has been held that the state of mind of a witness may be shown by evidence of fraternal lodge affiliation, *Felice* v. *State*, 18 Okla. Cr. 313, 194 Pac. 251; bitterness between families, *Ham* v. *State*, 21 Ala. App. 103, 105 S. 309; and race or nationality, *People* v. *Krug*, 10 Cal. App. 2d 172, 51 P. 2d 445. And in *District of Columbia* v. *Claasens*, 300 U. S. 617, 630-31, this Court said it was error to restrict cross-examination designed to show the interest of railroad detectives in a prosecution for illegal traffic in train tickets.

relates to the procedure for determining whether or not a document falls within the purview of "statement" as defined in 18 U. S. C. 3500(e). The second involves the production of statements which may have been made by prosecution witnesses to government attorneys and Congressional committee agents.

A. The procedure for settling doubtful problems under 18 U. S. C. 3500(e) has been described by this Court in *Palermo* v. *United States*, 360 U. S. 343, at 354:

> "The statute itself provides no procedure for making a determination whether a particular statement comes within the terms of (e) and thus may be produced if related to the subject matter of the witness' testimony. Ordinarily the defense demand will be only for those statements which satisfy the statutory limitations. Thus the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court. However, when it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose."

The three members of the Court who concurred in the result were of the same opinion on this point (360 U. S. at 361):

> "Questions of production of statements are not to be solved through one party's determination that interview reports fall without the statute and hence that they are not to be produced to defense counsel or to the trial judge for his determination as to their coverage. I am confident that federal trial judges will devise procedural methods whereby their responsibility is not abdicated in favor of the unilateral de-

termination of the prosecuting arm of the Government".

The procedure so described was not followed in the present case. Instead, the trial court took the position (R. 151-55, 488-94, and 527) that it is exclusively for the prosecution to determine whether or not a document in its possession is producible under 18 U. S. C. 3500, and that the court's only function is to review documents produced *in camera* for the excision of irrelevant matter. Furthermore, the court suggested to the prosecution that it not produce any documents other than such as the prosecution would be willing to have the court automatically treat as "statements" within the meaning of 18 U. S. C. 3500 (e), and the prosecution acceded to the suggestion (R. 493-94).[77]

Since the *Palermo* decision, the Court of Appeals for the Second Circuit has twice had occasion to apply the procedure therein described. In both cases, that court has held that the trial court not only should review "doubtful" documents, but should also, if necessary to an enlightened decision, conduct a *voir dire* examination *in camera* to resolve the question. *United States* v. *Tomaiolo,* 280 F. 2d 411; *United States* v. *McKeever,* 271 F. 2d 669. In both cases, convictions were reversed because the court disagreed with the trial court's rejection of the document as outside the scope of 18 U. S. C. 3500(e), and because the trial court had failed to pursue the question by a *voir dire* examination.

These decisions plainly show that the problem is not an abstract or technical one, and that the rights of the accused may be seriously infringed by an unduly narrow application of the statute in question. In the present case, the procedure was clearly erroneous under this Court's decision in the

[77] Under these circumstances, it is unnecessary to inquire whether or not the government thereafter withheld "doubtful" documents which, but for the court's ruling, would have been submitted for *in camera* review under 18 U. S. C. 3500(e).

Palermo case, and contrary to the proper practice as illustrated in the *Tomaiolo* and *McKeever* cases.[78]

B. In the course of trial, it was developed that the prosecution witnesses had conferred with or been interviewed by government attorneys on the subject-matter of the case (R. 274, 345, and 624) and that the witness Eckert had discussed the case with an agent of a Senate investigating committee (R. 218). The petitioner's motion for the production of statements under 18 U. S. C. 3500 extended to statements made to government attorneys and Congressional committee agents (R. 121-22). The prosecution, however, took the position that 18 U. S. C. 3500 does not embrace such statements (R. 122-29).

The trial court, despite petitioner's repeated contention, failed to rule on the legal issue, and refused to order the prosecution to produce any statements in the possession of the United States that might be in the hands of other government attorneys or Congressional agents (R. 131). The defense, having no other course then open to it, thereupon undertook to cross-examine the prosecution witnesses with respect to their discussions with such attorneys and agents, to lay a foundation for the renewal of the motion for production (R. 217-21, 255-59, 273-90, 345-54, 372-84, 623-26, and 643-54). Thereafter petitioner renewed the motions for production, specifying that statements to government attorneys and Congressional agents were included in its scope (R. 270, 384-85, 656, and 780). The motions were denied, on the ground that the existence of such statements had not been established by the cross-examination (R. 271, 387-91, 657-58, and 781).

The result of the trial court's rulings was to frustrate the purpose of 18 U. S. C. 3500. The statute explicitly

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[78]See also *Holmes* v. *United States*, 271 F. 2d 635 (C. A. 4), reaching a parallel conclusion under the analogous provision of 18 U. S. C. 3500(c).

covers "any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." This language plainly imposes on the prosecution the burden of making such inquiry as may be necessary to uncover *all* statements (or "doubtful" statements for review *in camera*) "in the possession of the United States". There was no basis for the prosecution's contention that the statute does not cover statements to government attorneys or Congressional agents, and the government apparently makes no such contention in this Court.[79]

In the present case the prosecution avowedly made no effort to determine whether or not there were statements producible under 18 U. S. C. 3500 in the hands of other government attorneys or Congressional agents, and explicitly disclaimed any responsibility for making inquiry to these sources (R. 122, 125, 128-29, and 387). The trial court declined to direct the prosecution to make such inquiry (R. 781).

The court below upheld the trial court's application of the statute on the ground that (R. 926) "there is nothing in the record to indicate that these witnesses had in these instances written, signed, adopted, or approved any writing or that any recording was made of any oral statement made to these agents." But under 18 U. S. C. 3500 the issue is not what the record shows about the *fact* of the existence of statements producible under the statute, but whether it shows that the prosecution and the trial court have taken the proper steps, on request, to carry out the statutory requirements. Here the record shows the contrary.

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[79]Brief in Opposition to the petition for certiorari, p. 17. A letter to a government attorney was involved in *Rosenberg* v. *United States*, 360 U. S. 367, and a Senate agent's summary of an interview was at issue in *Lee* v. *United States*, 360 U. S. 470. In neither case was it suggested that these sources are outside the scope of 18 U. S. C. 3500.

V.

PETITIONER WAS DENIED A FAIR TRIAL BY THE COURT'S CHARGE TO THE JURY WITH RESPECT TO THE INDICIA OF MEMBERSHIP IN OR AFFILIATION WITH THE COMMUNIST PARTY

At the prosecution's request and over the petitioner's objection (R. 824-25), the trial court embodied in its charge to the jury eleven of the thirteen indicia of membership in the Communist Party in Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844 (set forth in the Appendix, *infra* pp. 2a-4a). The relevant portion of the charge (R. 871-72) authorized the jury to "take into consideration whether the defendant" had done any of the things specified in clauses (3) to (13) inclusive of Section 5, together with "all the evidence either direct or circumstantial" bearing on the question of membership.

The validity of Section 5 of the Communist Control Act, in its application to the Internal Security Act of 1950, 50 U. S. C. 781 *et seq.*, is among the issues presented in *Communist Party of the United States of America* v. *Subversive Activities Control Board*, now pending (No. 12) following argument in this Court. The present case raises question of Section 5's validity as applied in criminal proceedings where membership in or affiliation with the Party is a governing issue of fact and, assuming its validity on its face, whether it was properly applied in this case.

The constitutional problems under the First and Fifth Amendments are plain on the face of the statute. To begin with, the preamble makes the ensuing "criteria" or "indicia" applicable only to "the Communist Party or any other organization defined in" the Communist Control Act. There is no rational basis for such a classification. As the

trial court charged the jury in this very case (R. 871): "Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party." Obviously, there is no reason for applying criteria such as those listed in Section 5 to the issue of membership in organizations defined in the Communist Control Act, but not to other organizations.

Secondly, the listed criteria, even if otherwise reasonable are invalid because unlimited in terms of time. All are explicitly made applicable to persons who, in the past, have done any of the things listed in the statute. No temporal limit is specified, and accordingly it must be assumed that evidence fitting the criteria shall be considered by the jury even if it relates to the remote past, and the defendant's supposed connection with the Party has long since terminated. This irrational element in the statutory standard was carried over into the instructions, for these left the jury free to consider the petitioner's conduct during the years of his conceded membership in the Party (as early as 1942), as evidence of his membership in 1951 and 1952.

The preamble states that the jury shall consider "evidence, if presented, as to whether the accused person" engaged in any of the conduct specified in the ensuing criteria. This language suggests that the jury should consider only affirmative evidence of conduct falling within the criteria, and give no weight to a failure of proof with respect to other criteria. Such a standard of proof is manifestly unreasonable, and grossly unfair to the accused.

In the present case, the trial court omitted from the instructions the first two criteria, dealing with membership lists and records of financial contributions. These are the only two criteria that, indisputably, bear a close relation to proof of membership. Presumably they were not included

in the charge because there was no evidence that, at the time the affidavits were signed, the petitioner was listed as a member of or made any financial contributions to the Communist Party. In other words, there was a complete failure of proof in this area; nevertheless, petitioner was deprived of the benefit of the strong negative implications and inferences which the jury might well have drawn from this lack of proof, had these criteria been included among the others.

Furthermore, if the first two criteria were omitted for lack of relevant evidence, so should others have been. There was, for example, absolutely no evidence that, at or near the time petitioner filed his affidavits, petitioner had "prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization" or "sent or delivered to others material or propaganda of any kind in behalf of the organization" (clauses (9) and (10) of Section 5).[80]

But the vice of embodying these criteria in the instructions lies even deeper than the foregoing considerations indicate, for most of the prescribed indicia are so vague and unprecise, and so remote from the facts of membership or affiliation, that their use clearly violates the due process clause. *Tot* v. *United States*, 319 U. S. 463, 467; *Lanzetta* v. *New Jersey*, 306 U. S. 451. Clauses (9) and (11), for example, make it evidence of membership for anyone to confer, counsel, or write or distribute literature "in behalf of the objectives" of the organization. Especially since other clauses (such as clauses (1) to (5)) refer to action for or in behalf of "the organization", this reference in clauses (9) and (11), as well as (12) and (13), to the "objectives" of

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[80]With the possible exception of petitioner's statement of resignation, there was no proof fitting these categories at *any* period of time.

the organization, would appear to cover mere parallelism. As *The Wall Street Journal* put it,[81] apparently referring to clause (12):

> "One of these provisions is that it would be evidence of cooperation with the Communist groups if any person has indicated a willingness to carry out aims and purposes of the party. For all we know the Communist Party may be against juvenile delinquency. So is this newspaper."

Standards such as these violate not only the due process clause, but the First Amendment as well. Their impact on freedom of speech, press, and assembly is direct, for clauses (6), (9), (10), (11), and (12) expressly deal with conferring, meeting, writing, and disseminating literature. In *De Jonge* v. *Oregon*, 299 U. S. 353, it was held that lawful exercise of the First Amendment freedoms may not constitutionally be penalized merely because the auspices are those of a subversive organization. But the present case goes much farther, because clause (11), for example, covers advising or counselling not only with "officers or members of the organization" but also with "anyone else" in behalf of the "objectives of the organization." See *Winters* v. *New York*, 333 U. S. 507, 519.

It is no answer to say that Section 5 is not a penal statute, or that the criteria it embodies are not absolute tests. The inescapable fact is that it directs judges to instruct juries that speech or writing, uttered or distributed quite independently of the Communist Party (or other organization), shall be considered as evidence of membership in the organization if it is "in behalf of the objectives" of the organization. The statutory mandate is hopelessly vague and unreasonable, and its acceptance as a standard of proof would be a sympton of decay in our judicial practice.

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[81] In its issue of Aug. 19, 1954, quoted in 100 Cong. Rec. 15111.

VI.

PETITIONER'S MOTIONS FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE WERE ERRONEOUSLY DENIED

In Nos. 3 and 71, petitioner filed motions for a new trial, under Rule 33 of the Federal Rules of Criminal Procedure based on newly discovered evidence bearing on the credibility of the witness Fred Gardner. The new evidence may be summarized as follows:

No. 3—In *Haug* v. *United States*, pending here on petitions for certiorari (Nos. 73 and 74 Misc. and 93), Gardner, testified that he had never served in the armed forces. He had also so informed the Federal Bureau of Investigation in 1955, as appears from a report furnished to the petitioner on the trial of the present case, under 18 U. S. C. 3500 (R. 4). The newly discovered evidence shows (R. 2-3) that Gardner had been in the United States Army during the 1920's and had deserted in 1926. The new evidence also discloses (R. 4, 8-9) that he had given the F. B. I. false information about the places and dates of his employment and residence during the period from 1925 to the early 1930's.

No. 71—As a witness in the present case and the *Haug* case, and in information which he furnished to the F. B. I., Gardner gave four different versions of his two marriages. In 1955, he told the F. B. I. (as appears from the document furnished to petitioner under 18 U. S. C. 3500, referred to above in No. 3) that he had married his second wife in 1945, but had not been divorced from his first wife until 1946 (R. 4). In January 1958, Gardner testified in the *Haug* case that he was divorced in 1945 and had remarried a few weeks thereafter (R. 4). Later that same month, under cross-examination in the present case, he testified that he had been divorced in March 1946 and had

married his second wife in November of that year. The new evidence, embodied in the testimony Gardner gave during the hearing on motion for a new trial in the *Haug* case, indicates that the version given by Gardner to the *F. B. I.* in 1955 is closest to the truth (R. 5, 13-16).

The facts are not in serious dispute, nor has the government contested the allegation in the first of the two motions (No. 3) that Gardner's testimony was essential to the proof of petitioner's guilt (R. 2). The basic issue is whether or not the newly discovered evidence warrants a new trial, under the general principles of *Mesarosh* v. *United States*, 352 U. S. 1, *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, and comparable decisions.[82]

It is true that a distinction has sometimes been drawn between new evidence relating to a material issue, and new evidence which relates to the credibility of the witness. Under the circumstances of this case, however, such a distinction would be arbitrary and unrealistic. The new evidence, especially that in No. 3 relating to Gardner's military service, does not deal with minor or immaterial discrepancies. This new evidence establishes conclusively that Gardner was a conscious and deliberate prevaricator, in his testimony about his military record and his marital history.[83]

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[82]In No. 71, petitioner also contends that the new evidence discloses that in No. 10 the trial court improperly interfered with the cross-examination of Gardner about his marital history, by openly expressing agreement with the prosecuting attorney's remark that the F. B. I. report contained a typographical error in stating that Gardner had "married" a second time in November 1945, before his divorce in 1946 (R. 9). Gardner's testimony on the hearing in the *Haug* case shows that this was not a typographical error, as Gardner well knew at the time he was testifying at petitioner's trial, and heard the prosecutor and court express their mistaken assumption.

[83]By giving the F. B. I. false information about his military record, Gardner may well have violated the very statute (18 U. S. C. 1001) under which petitioner stands convicted. A jury might well hesitate to convict a man for lying to a federal agency, on the testimony of another man who had himself lied to another federal agency.

The *Communist Party* and *Mesarosh* cases, *supra,* as well as *Napue* v. *Illinois,* 360 U. S. 264, have gone far to eliminate the distinction between new evidence relating to material issues, and new evidence with respect to credibility. The credibility of a witness may well, of course, be the crucial issue in a jury's mind. In the present case, the only evidence against petitioner was the testimony of Gardner and Mason concerning their conversations with petitioner during the period covered by his affidavits. It can not be seriously argued that new evidence, exposing Gardner as a liar and a deserter from the armed forces, does not go to the heart of the government's case against the petitioner.

Even if the new evidence is not deemed sufficient on its face to warrant a new trial, it was error for the trial court to deny the motion (in No. 3) without hearing. The trial court appears to have denied a hearing (R. 44-52) on the ground that the new evidence was collateral in nature, and that therefore a hearing would accomplish nothing. But this conclusion ignored the suggestion in the motion (R. 5) that Gardner, to cover up his desertion, might have lied about other matters, and the demand for disclosure of the government's previous knowledge, if any, of Gardner's desertion and his previous false statements (R. 5-6). Under these circumstances, it was an abuse of discretion to deny a hearing. *Cf. Remmer* v. *United States,* 347 U. S. 227.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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November 1, 1960.

APPENDIX

1. The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. 18 U. S. C. 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3. 29 U. S. C. 159 (h) (Section 9 (h) of Taft-Hartley) provides:[1]

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued

[1]Repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959 (P. L. 86-257).

pursuant to a change made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code[2] shall be applicable in respect to such affidavits.

4. Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844, provides:

In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

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[2] 35A of the Criminal Code was repealed by section 21 of the Act of June 25, 1948, 62 Stat. 862, and is now covered by 18 U.S.C. sections 286; 287, 1001 (involved here), 1002 and 1023

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectivgs and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Community Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

5. 18 U. S. C. 3500, the so-called "Jencks" law, provides:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion, of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to

deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsection (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

6. 18 U.S.C. 3237, the "continuing offense" statute, provides:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

Nos. 3, 10 and 71

In the Supreme Court of the United States

OCTOBER TERM, 1960

MAURICE E. TRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The majority (R. 903–928)[1] and dissenting (R. 928–930) opinions of the Court of Appeals in the main case are reported at 269 F. 2d 928, 946. The prior opinions of the Court of Appeals reversing petitioner's convictions following his first trial are reported at 247 F. 2d 130, 136.

The oral opinion of the District Court (R. (3) 44–52) denying petitioner's first motion for a new trial is not reported. The Court of Appeals affirmed that order without opinion (R. (3) 59).

[1] References to the record in the main case (No. 10) are prefixed "R." or "R. (10)." References to the records in Nos. 3 and 71 will appear as "R. (3)" and "R. (71)", followed by the appropriate page designations.

The oral opinion of the District Court denying petitioner's second motion for a new trial appears at R. (71) 22–26. The Court of Appeals again affirmed without opinion (R. (71) 28).

Also pertinent here is the opinion of the District Court in *United States* v. *West, et al.,* 170 F. Supp. 200, and that of the Court of Appeals for the Sixth Circuit in *West et al.* v. *United States,* 274 F. 2d 885, decided February 15, 1960, petitions for certiorari pending, Nos. 93, 73 Misc. and 74 Misc.

JURISDICTION

The judgments of the Court of Appeals (R. (10) 930, (71) 28, (3) 59) were entered on the following dates: in the main case, August 3, 1959, with petition for rehearing denied on August 21, 1959 (R. 936); on the first motion for a new trial, March 27, 1959; on the second motion for a new trial, March 22, 1960. On September 8, 1959, Mr. Justice Whittaker entered an order extending the time for filing a petition for a writ of certiorari in the main case to and including October 20, 1959 (R. 936), and the petition was filed on October 16, 1959. By order of Mr. Justice Whittaker, dated April 4, 1959, the time for filing a petition for a writ of certiorari on the denial of the first motion for a new trial was extended to May 26, 1959 (R. (3) 60). The petition was filed on May 25, 1959. The petition for certiorari on the denial of the second motion for a new trial was filed on April 18, 1960. The petitions were granted on May 31, 1960 (R. (3) 61, (10) 937, (71) 29; 363 U.S. 801). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the venue of petitioner's trial was properly laid in the United States District Court for the District of Colorado.

2. Whether the so-called "two-witness" rule in perjury cases applies to a prosecution under the "false statements" statute (18 U.S.C. 1001) for filing a false non-Communist affidavit.

3. Whether the evidence is sufficient to support the verdict.

4. Whether inadmissible evidence was received and cross-examination was prejudicially limited.

5. Whether petitioner was prejudicially deprived of any pre-trial statements of government witnesses by the trial court's rulings as to the application of 18 U.S.C. 3500.

6. Whether the trial court's instructions to the jury on the meaning of the terms "membership" and "affiliation" were correct.

7. Whether the trial court abused its discretion in denying petitioner's motions for production of grand jury testimony.

8. Whether the trial court properly denied without a hearing two motions for a new trial based on alleged misrepresentations by a government witness concerning details of his personal history, none of which was directly material to the issues of the trial.

STATUTES AND RULE INVOLVED

18 U.S.C. 1001:

> § 1001. STATEMENTS OR ENTRIES GENERALLY.
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, con-

conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

29 U.S.C. 159(h):[2]

§ 159(h) AFFIDAVITS SHOWING UNION'S OFFICERS FREE FROM COMMUNIST PARTY AFFILIATION OR BELIEF.

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or

[2] Section 9(h) was repealed on September 14, 1959, by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat. 519. Section 504(a) of the new Act provides that no person who is or has been a member of the Communist Party may hold office in a labor organization or association of employers dealing with a labor organization during or for five years after the termination of his membership in the Communist Party.

teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

18 U.S.C. 3500:

§ 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the

court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

18 U.S.C. 3237:

§ 3237. OFFENSES BEGUN IN ONE DISTRICT AND COMPLETED IN ANOTHER.

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

(b) Notwithstanding subsection (a), where an offense involves use of the mails and is an offense described in section 7201 or 7206 (1), (2), or (5) of the Internal Revenue Code of 1954 (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be

tried in the district in which he was residing at the time the alleged offense was committed: *Provided,* That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

Rule 33, F.R. Crim. P.:

NEW TRIAL

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

Count 1 of a six-count indictment (R. 1–4), returned on October 28, 1954, in the United States District Court for the District of Colorado, charged that petitioner unlawfully, wilfully and knowingly made and used a false "Affidavit of a Non-communist Union Officer" (Form NLRB 1081) executed on December 19, 1951, and that petitioner caused this affidavit declaring he was not a member of the Communist Party to be filed with the National Labor Relations Board, all in violation of 18 U.S.C. 1001.

Count 2 charged a similar violation of 18 U.S.C. 1001, in that the same affidavit was false in stating that he was not affiliated with the Communist Party. Counts 4 and 5 charged that he falsely denied membership and affiliation, respectively, in the Party in a second affidavit, executed December 3, 1952, and thereafter filed with the Board.[3]

Following a trial by jury, petitioner was found guilty on each of these four counts, but on appeal to the Court of Appeals the judgment of conviction was set aside and a new trial ordered because of error by the trial court in permitting cross-examination of petitioner's character witnesses. *Travis* v. *United States*, 247 F. 2d 130 (C.A. 10). Petitioner was thereafter retried on January 13, 1958, and was again convicted on all four counts (R. 25). He was sentenced to four years' imprisonment and a fine of $2,000 on each of counts 1 and 4, the prison terms to run consecutively, and to four years' imprisonment on each of counts 2 and 5, to run concurrently with the terms imposed on counts 1 and 4—a total of eight years' imprisonment and a $4,000 fine (R. 23–24). Petitioner then moved for a new trial or in the alternative for a hearing on the motion for a new trial. The motion was denied by the District Court. See oral opinion, R. (3) 44–52. The Court of Appeals affirmed this action without opinion (R. (3) 59). The judgment of conviction was affirmed by the Court of Appeals, one judge dissenting, on August 3, 1959 (R. (10) 930). A second motion for a new trial was

[3] On motion of the government, counts 3 and 6 of the indictment were dismissed prior to the first trial (R. 15).

denied by the District Court in an unreported opinion (R. (71) 22–26) and was affirmed by the Court of Appeals without opinion (R. (71) 28).

The evidence adduced by the government may be summarized as follows:

THE FILING OF THE AFFIDAVITS

At the trial, it was stipulated by petitioner's counsel that both affidavits were executed by petitioner, as an officer of the International Union of Mine, Mill & Smelter Workers ("Mine-Mill"), were mailed in Denver, Colorado, and were received by and filed with the National Labor Relations Board in Washington, D.C. It was further stipulated that the making and filing of the affidavits is a matter within the jurisdiction of an agency of the United States Government, *viz.*, the National Labor Relations Board, and that, during the life of the affidavits, the Mine-Mill Union was in compliance with subsections (f), (g), and (h) of Section 9 of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159 (f), (g), and (h)) (R. 27–30, 31–38; Exs. 1–6, R. 884–889).

THE FALSITY OF THE AFFIDAVITS

The evidence adduced by the government to prove that petitioner, from a time antedating the execution of the first of the two affidavits here involved (December 19, 1951) to and beyond the date of the execution and transmittal of his second affidavit (December 3, 1952), was at all times a member of the Communist Party may be summarized as follows:

A. EVIDENCE ANTEDATING THE FIRST AFFIDAVIT (OF DECEMBER 19, 1951)

1. Petitioner's membership in the Communist Party dates back at least to 1942, when he held the position of Party co-ordinator for Mine-Mill in northern California (R. 41–42). From 1942 to 1944, his Communist Party assignment was to carry on Party work inside the Mine-Mill Union in northern California (R. 43). His participation in the Party's work inside Mine-Mill is illustrated by an incident in 1942, when he informed government witness Kenneth Eckert,* a fellow Mine-Mill official and Party member (R. 34, 41, 42), that Allan McNeal, then the Administrative Assistant to the President of Mine-Mill, was the ranking Communist Party official inside the Union and that he (Eckert) should treat instructions from McNeal concerning Party work in the Union as authoritative Party instructions (R. 44–45). Petitioner thereafter steadily progressed to positions of prominence and leadership within Mine-Mill, becoming Assistant to the President in 1946, Vice President in 1947, and President later in that year. Since 1948, he has been Secretary-Treasurer of the International Union (R. 455–456).

In 1946, petitioner became a member of a group known as the "Steering Committee" (R. 47). The Steering Committee was not an official organization

*Eckert was a member of the Communist Party from 1931 to 1948, except for two relatively short periods while he was abroad and a member of the armed services (R. 34). He attended Party schools at Toledo and Camp Robinhood, Ohio, and in Moscow, U.S.S.R. (R. 40).

of Mine-Mill, but a committee of Mine-Mill leaders who were members of the Communist Party and designated by the Party to coordinate Party activities within the Union (R. 47). Immediately preceding the formation of the Steering Committee, the Executive Board of Mine-Mill was equally divided between Communists and anti-Communists so that the Party was unable to control the Union effectively (R. 53–54). At the organizational meeting of the Steering Committee—held in Chicago in 1946 (R. 47) and attended by such prominent Party leaders as John Williamson, National Trade Union Secretary, Gil Green, Illinois State Secretary, and Fred Fine, Illinois Trade Union Secretary—petitioner stressed the importance of establishing a committee of Communists inside Mine-Mill for the purpose of facilitating and coordinating the Party's work within the Union (R. 48–49).

In the years following its organization, the Steering Committee met "very frequently" (R. 49) and was usually presided over by petitioner, John Williamson, or Gil Green, "or some other ranking Communist official" (R. 51). At one of these meetings, held just prior to a Mine-Mill International Executive Board meeting in the early part of 1946 (R. 55), petitioner pointed out that since the Party now had a majority on the Executive Board it was necessary to reverse some of the actions which the anti-Communist faction on the Board had taken at an earlier meeting (R. 57). The proposals suggested by petitioner were subsequently adopted by the Union's Executive Board (R. 60–61).

A few months later, in the spring of 1946, the Steering Committee called a mass meeting which was held in Chicago and attended by about 75 persons who were members of both the Communist Party and the Mine-Mill. Petitioner, who presided over this meeting, stated that it had been called to bring together a considerable number of Communist Party members in Mine-Mill and to acquaint them with the "changed situation" in the Union and the efforts being made to increase the Party's role therein. He submitted for their approval a ten-point program, which was adopted at the meeting and thereafter submitted to the Union's Executive Board and the International Convention of Mine-Mill held in Cleveland later in the same year (R. 61-63).

In the fall of 1946, just prior to Mine-Mill's annual convention, the Steering Committee met with John Williamson, the Party's national trade union secretary, in Cleveland, to map out the Party's strategy in selecting and supporting candidates for international office in Mine-Mill. Petitioner stated that he agreed with Williamson that the Party should support a candidate for Secretary-Treasurer who (though he was not a Communist) could be counted on by the Party to refrain from supporting the attempt of the non-Communist faction to remove the then President and other officers (R. 64–65). This strategy was substantially carried out at the convention (R. 65).

The practice of holding strategy meetings in order to consolidate action by Party members inside Mine-Mill and to further Party objectives continued

through 1947, when the Steering Committee convened on a number of occasions prior to and during the Mine-Mill convention held in St. Paul that year (R. 66–68). At one of these meetings attended only by Party members (held at the Chicago home of Henry Horowitz, a Party member who was an associate editor of the Union paper), petitioner and Gil Green, Illinois Communist Party Secretary, agreed that, because of opposition from the CIO to petitioner and other Communist officers of Mine-Mill, petitioner should not become a candidate for the office of President. The Committee decided to support the candidacy of Jack Clark, a non-Communist who could be relied on not to oppose the Communists in the Union, for the office of President and petitioner for Secretary-Treasurer (R. 68–69, 70–72).

2. In June 1947, Congress passed the Labor Management Relations Act, 1947 (61 Stat. 136), which, among other things, amended the National Labor Relations Act so as to restrict the enjoyment of significant statutory rights to labor unions whose officers filed with the National Labor Relations Board affidavits attesting that they were not members of, or affiliated with, the Communist Party (Sec. 9(h), *supra*, pp. 4–5).

In February 1948, a large group of leading Party members who held offices in labor unions, including petitioner, met in New York City for the purpose of formulating a Party policy with respect to the affidavit requirement of the new Act. Present at the meeting were such prominent national leaders of the Communist Party as William Z. Foster, its National

Chairman, Eugene Dennis, its General Secretary, and John Williamson, its National Trade Union Secretary. After an extended discussion, it was decided that the Party policy should be not to sign the non-Communist affidavits (R. 83–89). Shortly after the meeting, petitioner told Eckert, who had also been present, that they would "just have to live with" the Party's decision (R. 88–89).

At a formal meeting at his home in Chicago a few weeks later, petitioner related the Party policy to a group of Communist Mine-Mill officers and told them that they would have to abide by it (R. 89–90). Gil Green, who was present at this meeting, suggested that Communist-dominated unions could avoid the effects of not being entitled to have their names placed on the ballot in Labor Board elections because their officers had not complied with the affidavit provisions of the Act by asking the people involved (in the unions) to mark the ballot "No" (R. 90–91). Petitioner then asked Green whether the policy of Lenin as expressed in a booklet called "Left-Wing Communism" was applicable to the present situation. Green replied that it was. Lenin, in this booklet, stresses the necessity for Communists to work inside trade unions and to remain in them at all costs, no matter what trick or artifice must be employed by them in order to do so (R. 91). Green also explained that the law did not require the affiant to swear that he had not been a member of the Party prior to, or that he would not become a member after, the date of the signing of the affidavit, and suggested that Communist labor leaders should organize and

belong to a "Thursday afternoon social club" to circumvent the law (R. 91–92).

In accordance with the Party position, the Executive Board of Mine-Mill decided not to comply with the non-Communist affidavit provision of the new law (R. 457–459; R. 99–100). By June 1949, however, petitioner told government witness William Mason that the Executive Board of the Union would soon be acting on its non-compliance policy because Mine-Mill had been losing elections as a result of the fact that its name could not appear on the ballot, and, furthermore, that there had been "discussions going on within the Party on this whole deal" (R. 461–462). Shortly thereafter, in July 1949, the Executive Board passed a resolution changing its previous position and stating that the Union would thereafter comply (R. 460–461).

3. Several days following this action by the Executive Board, in July 1949, petitioner told Mason that the Union's policy change would not mean that he would have to quit his Union office, but that it would mean he would have to "resign from the Party" (R. 463–464). He handed Mason a typewritten statement which he said was his "resignation statement" (*ibid.*). This statement, he said, " had been cleared with Ben Gold"[5] and other "Party" people in New York and was shortly to be published in the Union

[5] Gold was one of the Party leaders who attended the 1948 strategy meeting in New York (R. 83–85). He was at that time a member of the Party's "Central" or National Committee (R. 84–85).

paper (*ibid.*). Mason[6] asked petitioner whether this would be the policy pursued by Communists in other unions and was told by petitioner that the Party thought it the best policy for Communists in unions to follow (R. 464).

The August 15, 1949, issue of the Union paper contained an article by petitioner announcing that he had "resigned from the Communist Party" "in order to make it possible for me to sign the Taft-Hartley affidavit" (G. Ex. 8; R. 890). The exact date of the "resignation" does not appear from the record, nor does the record contain any document purporting to constitute the resignation.[7]

B. POST-"RESIGNATION" EVIDENCE

In the fall of 1951, on the occasion of petitioner's first meeting with government witness Fred Gardner,[8] petitioner admitted his continued membership in the Communist Party. Petitioner told Gardner that he (Gardner) had come to Mine-Mill with "excel-

[6] Mason was a Walking Delegate for the Butte Mines Union No. 1 of the International Union of Mine, Mill & Smelter Workers in 1936 and 1937. In 1939 and 1940, he was Financial Secretary of the Union; in 1944, President of the Union. He was Executive Board member for District No. 1 of the International Union in 1941 and 1942 and from 1945–1953 inclusive (R. 452–454). Mason was a member of the Communist Party for a brief period in the early 1930's (R. 455).

[7] Witness Eckert testified that, based upon his experience in the Communist Party from 1931 to 1948, "the policy of the Party" was that "once having joined the Communist Party you could not leave without being expelled" (R. 117–118).

[8] Gardner was a member of the Communist Party from 1933 to 1955 (R. 437). From 1951 to 1955, he was employed as an International Representative of the International Union of Mine, Mill & Smelter Workers (*ibid.*).

lent recommendations" from "the Communist Party of Cleveland" (R. 442–443). Petitioner related to Gardner that he (petitioner) had had difficulty in crossing the border into Canada because of his "membership in the Party" and "public resignation" therefrom (R. 443). He confided to Gardner that his formal resignation from the Party in 1949 was not an actual resignation and termed it a "mistake" because it had provided the "enemies of the Party" with an opportunity to point out that it was not a "true" resignation (R. 443–445).

In March 1952,* the Communist labor union leaders delegated to petitioner the assignment of communicating with one Salon, a leader of the World Federation of Labor Unions, in Paris. The Soviet delegation to this organization, meeting in Paris, was attempting to force the "American left-wing" unions to form a "third federation." The decision whether to do this had been delegated by the American Communist Party to the unions themselves. After discussing the problem, the officers of the "left-wing unions" decided that they were not in favor of such a move and assigned to petitioner the task of relating this decision to the World Federation of Labor Unions (R. 465–468).

In March 1953, a staff conference of Mine-Mill was held in Denver, Colorado (R. 469–470). The proposed agenda for this conference contained a "legislative program" which listed a number of items such as "repeal of the McCarran Act" and "the fight

* This date falls between the execution of the first (December 19, 1951) and the second (December 3, 1952) affidavits filed by petitioner.

against witch-hunting." When Mason called petitioner's attention to the fact that the Union's legislative program listed no matters pertaining to the betterment of working conditions, petitioner admitted the error and directed the insertion of additional matters in the program (R. 470–471). He told Mason, however, that "these other things too like repeal of the McCarran Act are important" because "[w]hen they get us Communists they will be after people like you if we don't get these laws repealed" (R. 471–472).

In June 1953, witness Gardner was transferred by Mine-Mill to a new assignment in the Coeur d'Alene Mining District of Idaho. Petitioner instructed him to stop off in Denver on his way to Idaho for a "briefing." (R. 445–446). At a meeting in petitioner's home in Denver, petitioner related to Gardner the particulars of a factional dispute between Mine-Mill Party members in the Coeur d'Alene area and warned him that for this reason he should "remain aloof" from any Party activity until further notified. He told Gardner that he felt certain that the dispute would be resolved by the expulsion of certain persons from the Party and that Gardner could reactivate himself in the Party upon being contacted by someone whom petitioner would identify to him beforehand (R. 446–448).

In a conversation with petitioner in August 1953, at Butte, Montana (R. 476–477), witness Mason accused petitioner and his Party-member subordinates in the Union of trying to undermine the leadership of the Union's District No. 1 in the midst of a bargaining conflict with employers in that area, because the Dis-

trict No. 1 leadership was opposed to Communist domination of Mine-Mill. Mason stated that he recognized that petitioner was the leader of the Party in the Union and was talking to him in that capacity, warning him that the Party's tactics had made some of the Union's leadership in Montana angry. Petitioner did not deny these accusations, but apologized to Mason and told him that he had pursued this policy because he had been misinformed by Clark, the Union's President. At one point in the conversation, petitioner offered to resign his office as Secretary-Treasurer and at another he asked Mason to come to Denver to discuss these difficulties with him and other Communist Party members in the Union (R. 477–479).

In a sequel to this conversation, which took place in Denver (R. 481–483), Mason reverted to the matters discussed in Butte and stated that conditions within the Union caused by Communist domination, such as the policy of the Union paper of constantly criticizing the foreign policy of the United States, should be changed to conform to the thinking, aims and aspirations of the rank and file membership. Petitioner advised Mason that the position the latter had outlined was "in direct opposition to the Party" and that his suggestion that the policy of the paper be changed was not "realistic." He went on to state that the Party leadership in the Union, including himself, felt that there should be "no compromises" because there had been "too many compromises already." He noted that "the Soviet Union is becoming stronger," and that this was true also of the "po-

sition of the Communist[s] in the Union," who, along with other Communists, had been able to "repulse the raid and hold this union and other unions" (R. 483–484). When Mason threatened an open fight on the Communist issue, petitioner pointed out that he would have the machine and the paper to use against Mason in such a fight. He concluded the conversation by telling Mason that he (Mason) had been "invited to get into the Party" and that "had [he] done so" he "would be sitting high in the councils of this organization with us" (R. 484–485).

THE CHARGE TO THE JURY

On the meaning of membership, the trial court charged that "there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member." The judge also told the jury that in determining this question they were permitted to take into consideration eleven factors which he enumerated for them (R. 870–872).[10]

With respect to affiliation, he charged the jury (R. 873):

> "Affiliation" as used in the second and fifth counts of the indictment is not the same as membership. The word "affiliated", as used in the second and fifth counts of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

[10] The eleven factors were taken from the Communist Control Act of 1954, but the judge merely stated the factors without mentioning that Act.

A person may be found to be "affiliated" with an organization even though not a member, where there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis.

"Affiliation" includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving a reasonable cause for the charge of a breach of good faith.

Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you, ladies and gentlemen, are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence.

On the issue of knowledge and intent, the trial judge charged the jury as follows (R. 870–871):

The acts charged in the indictment are alleged to have been done "knowingly" and "wilfully". The word "knowingly" means to act voluntarily and purposely and not because of a mistake or inadvertence or other innocent reason. The word "wilfully" means to act voluntarily and purposely and with the intent to do that which the law forbids.

* * * * *

> Intent is a state of mind and can only be determined by what an individual says and what he does. * * *

He further charged (R. 875) that the government had the burden of proving intent beyond a reasonable doubt, and that the intent required to be proved was a specific intent as distinguished from a mere general intent.

THE FIRST MOTION FOR A NEW TRIAL

At petitioner's trial, Fred Gardner (whose testimony provides the basis for both motions for a new trial) testified on direct examination concerning two conversations he had had with petitioner in 1951 and 1953 (*supra*, pp. 17–19). The significance of Gardner's testimony to the trial issues was that it tended to prove that petitioner's pre-1949 membership in the Party—which was undisputed—was not terminated at the time of his announcement in 1949 that he had "resigned", but continued beyond that time to and beyond the dates of both the affidavits in issue. One of the two other government witnesses (Mason) similarly testified to conversations with petitioner which tended to prove that petitioner was still a member of the Party in 1952 and 1953—between and after the affidavit dates (*supra*, pp. 19–21). No evidence was offered by petitioner contradicting the government's proof that he was a Party member at the time he signed the two affidavits (R. (3) 29–30).

A few days before Gardner testified in petitioner's case, he had appeared as a government witness in *United States* v. *West, et al.*, a prosecution in the United States District Court for the Northern Dis-

trict of Ohio, for conspiracy to file false non-Communist affidavits in violation of 18 U.S.C. 371 (R. (3) 2). Gardner's testimony on direct examination in the *West* case concerned experiences he had had in the Communist Party involving the defendants in that case. On cross-examination in the *West* case, Gardner was asked whether he had ever been in the Armed Forces and he answered "No." (R. (3) 30–31). As a result of information received by one of the attorneys for the defense in the *West* case, indicating that this testimony by Gardner concerning his military history was untruthful or inaccurate, those attorneys communicated with the Department of Justice requesting that it investigate the matter (R. (3) 2). See *United States* v. *West*, 170 F. Supp. 200, 206–207 (N.D. Ohio). They were advised in a letter dated October 8, 1958, from the Acting Assistant Attorney General, Internal Security Division, that investigation of Army service records revealed that Gardner served in the Army from January 25, 1922 to May 30, 1925; that he was absent without leave for a short time during this period, as a result of which he had been tried by court martial and sentenced to two months' confinement at hard labor and to forfeit $20.00 per month in salary for that period; and that he re-enlisted in the Army on January 21, 1926, and was assigned to Fort Riley, Kansas, but deserted on May 11, 1926, and never returned (R. (3) 3). The Army records further reflected, the letter stated, that Gardner had given December 13, 1903, as his date of birth [11] and that he was not, at the time of the inquiry,

[11] Gardner testified, on cross-examination, at petitioner's trial that he was born in 1906 (R. 498). The court in the *West* case, in its opinion denying a motion for a new trial, observed that "The evidence offered at the hearing on the motion was

wanted by the Army as a deserter (*ibid.*). See also *United States* v. *West, supra,* 170 F. Supp. at 205. Thereafter, on October 16, 1958, the *West* defendants moved under Rule 33, F.R. Crim. P., for a new trial, relying on this newly discovered evidence (R. (3) 3). After a full hearing, lasting three and one-half days, in which witnesses were examined under oath and documents received in evidence, the motion was denied. *United States* v. *West, supra.* The Court of Appeals for the Sixth Circuit affirmed the denial of the motion for new trial in that case, 274 F. 2d 885.

Petitioner's motion for a new trial in this case (R. (3) 2–6) was filed in the District Court on October 17, 1958. The motion, after setting forth *verbatim* the above-mentioned letter from the Acting Assistant Attorney General, Internal Security Division, to defense counsel in the *West* case (R. (3) 3), alleged that this newly discovered evidence indicated that Gardner had given untruthful testimony about his military service in the *West* case and was inconsistent with his testimony on cross-examination in the instant case as to the date of his birth [12] (R. (3) 3–4). The motion further alleged that the newly discovered evidence indicated that Gardner had given false information to the F.B.I. (appearing in a statement furnished to petitioner at the trial pursuant to the provisions of 18 U.S.C. 3500 (the so-called Jencks Act)) to the effect (a) that he was born on July 13,

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to the effect that Gardner had voluntarily enlisted in the Army on January 25, 1922, at the age of 15 * * *. He accomplished this by misstating his date of birth as December 13, 1903, instead of the true date of birth which was July 13, 1906" (*United States* v. *West*, 170 F. Supp. 200, 205).

[12] See note 11, p. 24, *supra.*

1906; (b) that he had had no military service; (c) that he had been employed by the duPont Chemical Co. at Niagara Falls, New York, from 1925 to 1929; and (d) that he had resided at Niagara Falls, New York, from 1925 to 1929 (R. (3) 4). The motion recited that these facts established that Gardner had "committed perjury in the *West* case," that he "may have committed perjury" in the instant case,[13] and that he had "violated the very statute under which [petitioner] was being tried" by giving false information to the F.BI. (R. (3) 4).

On October 31, 1958, argument of the motion for a new trial (R. (3) 12–44) was had before Chief Judge Knous, who had presided at petitioner's trial. In the course of the argument, counsel for petitioner filed with the court a letter from E. I. duPont De Nemours and Co., Niagara Falls, which stated that Gardner worked for Roessler and Hasslacher Chemical Company from August 12, 1926 to February 16, [redacted] (R. (3) 15–16). It appeared from another source that duPont had taken over this company in 1930 (R. (3) 16). On behalf of the government, Mr. Donald E. Kelley, United States Attorney for the District of Colorado, filed with the court a statement reciting that neither the attorneys who had prosecuted petitioner's case, nor

[13] Gardner's date of birth was not material to any issue presented at his trial in the case at bar or in the *West* case. It would also appear that Gardner's testimony in the instant prosecution which petitioner says "may have" been perjurious, *i.e.*, that he was born in 1906, was the truth, and that it was the date of birth which he apparently gave the Army when he enlisted in 1922, *viz.*, 1903, in order to conceal the fact that he was too young to enlist, which he misrepresented (see note 11, p. 24, *supra*).

any other attorneys or agents of the Department of Justice, including members of the F.B.I., had had any knowledge of Gardner's military service at the time of trial or prior to the receipt of information from the Department of the Army under the circumstances related above (*supra,* pp. 24–25; R. (3) 7, 12–14).

Following argument, Judge Knous rendered an oral opinion denying petitioner's motion (R. (3) 10, 44–52). Judge Knous assumed, for purposes of ruling on the motion, that Gardner had misrepresented his military service history at the *West* trial, had given erroneous information to the F.B.I. in respect to his past employment and residences, and had made inconsistent statements with regard to the year of his birth (R. (3) 45, 46, 48–49, 51–52). He held, however, that, because none of these matters "went to a material issue in the case" and none had "any bearing whatsoever upon the question of the guilt or innocence of the defendant" (R. (3) 47, 48), and because the newly discovered evidence relied on was merely "cumulative" and "impeaching" (R. (3) 48–49), the motion presented no proper basis for the granting of a new trial (R. (3) 44–52).

On appeal, this judgment was affirmed without opinion.

THE SECOND MOTION FOR A NEW TRIAL

The second motion for a new trial also involves a claim of newly discovered evidence bearing on the credibility of Fred L. Gardner.

On cross-examination, Gardner testified that he thought his first marriage terminated (R. (71) 8–9) in divorce in March 1946, and that he remarried in November 1946. The specific dates differed from testimony Gardner gave at the trial in *United States* v. *West, et al.* (R. (71) 4–5, 11–12) and from information he had furnished to the F.B.I. When defense counsel interrogated the witness concerning these variations, government counsel suggested the possibility of a typographical error in the F.B.I. report (R. (71) 8–10). However, the trial judge ruled that the jury was to determine whether or not a typographical error existed, and the F.B.I. report was read to the jury by petitioner's counsel (R. (71) 9–10).

In the *West* case, on the hearing on the motion for a new trial, defense counsel questioned Gardner about these same alleged inconsistencies. Testimony at that hearing was as follows (R. (71) 13–16):

> Q. Now which of these three—well, I will withdraw that. What are the facts, Mr. Gardner, with respect, let us say, first to your divorce?
>
> A. Well, I am not certain. Here is what happened—do you want me to tell you actually what happened?
>
> Q. Yes, I would like to know.
>
> A. In June or approximately of 1945 we, my first wife and I, agreed upon a divorce and she agreed to get that divorce.
>
> Sometime later in that year her attorney requested that I sign some papers stating that it was impossible to formalize that divorce until these papers had been signed. I signed the papers and ask[ed] if he would let me know

what happened and I assumed that he did later on, let me know, because I knew I had gotten a divorce.

Q. How did you know you had gotten a divorce?

A. He sent me some papers.

Q. Have you got those papers?

A. I haven't them with me and I don't know whether I still have them or not.

Q. What was the name of this attorney?

A. I don't remember his name. He was an American Labor Party attorney in Yonkers. I am sure I have got his name some place at home.

Q. So that you don't even know for sure that you were ever divorced?

A. Yes, I do know I was divorced in Queens County Court.

Q. You are sure of that?

A. I am positive of that. There is no question about it.

* * * * *

Q. Now, Mr. Gardner, when did you marry—remarry, I mean?

A. Well, I think in, actuality there was no formal marriage in that sense, but as far as I was concerned I was married in November.

Q. Of what year?

A. Of 1945.

Q. Now what do you mean by no formal marriage in that sense?

A. I mean we didn't go through a ceremony.

Q. No ceremony at all?

A. No, sir.

THE COURT. Common law marriage?

THE WITNESS. Yes, sir.

Q. Common law marriage that was contracted, you think, some six months before the divorce?

A. Well, as far as I was concerned, I was divorced, I didn't know the technicalities of the thing, but we had agreed upon it, the lawyer said it would go through and in my mind it was a divorce.

Q. What State was this marriage contracted in?

A. Well, actually it was contracted in Pennsylvania. She was in Minneapolis and I was coming back from South Dakota and I stopped there and picked her up and we came on into Pittsburgh.

Q. I don't suppose you know, and I really shouldn't ask you for legal advice, Mr. Gardner, I don't suppose you know whether common law marriages are legal in Pennsylvania?

THE COURT. Well, that is a question of law. You don't need to answer that.

Q. You didn't check into that matter, did you?

THE COURT. You don't need to answer that.

MR. RABINOWITZ. I'm sorry.

Q. Well, why did you tell the FBI agents in Butte that you had been married in Minneapolis in 1945?

A. Well, I don't think that that was actually what I said. I think actually what I said was that I picked up my present wife up in Minneapolis and we went on to Pittsburgh in about November of 1945. Now what interpretation he placed on that I have no control over and I don't know. But I am sure that that is the fact because that is what I have always said when I was asked for the details of it.

Q. Well why did you tell counsel in this case that you were divorced in 1945 and married a few weeks later?

A. Because in my mind that is exactly what had happened.

Q. Why did you tell counsel in the Denver case that you were divorced in 1946 and married a few months later?

A. Because when I went from here to Denver that was my recollection there that I had made a mistake here, and when I got home my wife informed me that as far as she was concerned, and I agreed as far as I was concerned, it was 1945.

Q. You mean you and your wife decided on precisely when it was that you had gotten married?

A. Well, it wasn't a question of deciding on it, it was a question when in our minds it was actually a marriage was consummated.

The District Court wrote an opinion denying the motion (R. (71) 22–26), and the Court of Appeals affirmed.

SUMMARY OF ARGUMENT

I

Venue was properly laid in the District of Colorado, the place where the false affidavits were executed and placed in the mail. It is true that the offense was not completed until the papers were received in Washington, D.C., the prescribed place of filing, but 18 U.S.C. 3237 explicitly provides that an offense begun in one district and completed in another may be prosecuted in either. It cannot be said that the acts done in Colorado constituted mere preparation, for when the affidavits were placed in the mail

petitioner's active participation in the offense was at an end; the completion of the offense, which ensued in ordinary course, was at that point a matter beyond his control. Nor is it significant that the Labor Board's jurisdiction did not attach until the papers were actually received. We deal here with the classic situation of "a continuously moving act, commencing with the offender and hence ultimately consummated through him," *United States* v. *Lombardo*, 241 U.S. 73, 77.

II

The "two-witness" rule applicable in perjury cases does not apply to prosecutions under 18 U.S.C. 1001, the "false statements" statute, and the district court was not required to grant an instruction based on that rule.

The perjury rule, we emphasize, does not rest on constitutional considerations or upon statute. It is a rule, traceable to the common law, which has always been limited to the offense of perjury, and it rests upon the policy consideration that one compelled to testify should receive protection against harassment stimulated by retaliatory motives. *Weiler* v. *United States*, 323 U.S. 606. Petitioner was not compelled to file affidavits and there was no serious prospect, as in the case of one testifying in a bitterly fought lawsuit, that his act would engender resentment or hostility.

The "false statements" statute has been on the books for over a century and during that long period it has never been held that the "two-witness" rule applies to prosecutions thereunder. A practice which has stood so long must certainly be taken to accord

with the judgment of Congress, which has the power to fashion rules of evidence for the federal courts. Moreover, the action of Congress in making the filing of false affidavits under Section 9(h) subject to prosecution under 18 U.S.C. 1001, rather than under the perjury statute, must be regarded as a deliberate determination by the legislature that prosecution for this offense shall be subject to the traditional practice which has always prevailed in the case of all prosecutions under the "false statements" statute.

III

The evidence was clearly sufficient to support the jury's finding that the affidavits were false. It was shown, to begin with, that petitioner was a leading, active and zealous Communist over a period of years and that he was fully acquainted with Party policies, including those adopted upon the occasion of the enactment of Section 9(h). After petitioner submitted his ostensible resignation, he continued to engage in conduct which, if the testimony of the prosecution's witnesses is believed, is consistent only with continued membership in the Party. He confided to witness Gardner that the formal resignation was not an actual resignation and he gave Gardner detailed instructions as to how the latter should reactivate himself in the Party following his transfer to an assignment in Idaho. Petitioner was delegated important tasks by Communist labor union leaders. In conversations with witness Mason relating to various union affairs, he openly referred to himself as repre-

senting the Party leadership in Mine-Mill and he included himself within the term "us Communists."

Petitioner argues that the testimony as to his conversations with Gardner and Mason was not corroborated, and seeks support from this Court's decision in *Opper* v. *United States,* 348 U.S. 84. That case, however, deals with the matter of corroboration in an entirely different context, *i.e.,* where admissions are made to law-enforcement officials following an arrest. There is nothing in the present situation to warrant an inference that petitioner's admissions to Gardner and Mason might have been induced by fear, coercion, or hope of leniency. Moreover, we believe that petitioner's history did furnish corroboration of the Gardner and Mason testimony.

IV

Petitioner's various challenges to the admission or exclusion of evidence do not show, in any instance, the commission of prejudicial error.

A. Petitioner objects to the admission of evidence concerning his activities in the Communist Party during the period of 1942–1948, on the ground that such evidence tended to prejudice the jury against him and that it was unnecessary to offer it because of his willingness to stipulate that he was in the Party during that time. The short answer is that petitioner's offer to stipulate the bare fact of membership would hardly establish what the government was entitled to show—that petitioner was a dedicated and zealous member, that he was high in the Party councils and familiar with the Party's strategies, and that he represented

the Party leadership in the Mine-Mill union. It cannot be seriously questioned that the character of petitioner's membership was relevant to a judgment on the issue whether his purported resignation was real or sham.

B. Petitioner objects to testimony of a long-time Communist (Eckert) that the Party policy was that, once you joined the Party, you could not leave it without being expelled. This testimony was relevant because, as the trial judge ruled, there was evidence of petitioner's familiarity with the policy. In other words, it bore on the question whether petitioner's attitudes were such that he was a man who was likely to sever his connection with the Party in the absence of a breach between himself and the Party hierarchy. We emphasize further that the trial judge carefully instructed the jury that membership was a matter of mutual consent, *i.e.*, a member could resign irrespective of the organization's wishes.

C. Petitioner objects to limitations which were imposed upon his cross-examination of government witnesses when he was seeking to show possible bias or hostility.

As to witness Mason, the claim is that petitioner was prevented from showing that Mason feared denaturalization and might be engaged, for that reason, in currying favor with the government. But the evidence showed that Mason had revealed his past membership in the Communist Party to the Immigration and Naturalization Service in 1938, before he was naturalized. Thus, the evidence negated any supposition that Mason might have apprehended a denatural-

ization proceeding grounded on allegations of fraud.

As to witnesses Eckert and Gardner, petitioner sought to develop the theme that these men, having become members of other unions (United Automobile Workers and the Hod Carriers), might be biased against petitioner because those unions, in some matters, were rivals of petitioner's union (Mine-Mill). Assuredly, it was within the broad discretion of the trial judge, in controlling the conduct of the trial, to prevent a trial within a trial on the collateral issue of the extent to which the three unions in question might be deemed competitors or rivals.

V

The instruction on membership, which was similar in all essential respects to approved instructions given in other cases involving the issue of Party membership, was proper. The jury was advised that, in order to find that petitioner was a member of the Party on the critical dates, it must find that he desired to belong to the Party and that the Party considered him a member. The court instructed that a verdict of "guilty" could not be rested on isolated acts or statements showing corroboration or sympathy with the Party and that the jury must draw its ultimate inference as to membership or non-membership on the basis of all of the evidence.

The fact that the court referred to various criteria or indicia of membership which are elaborated in the Communist Control Act of 1954 (the court set out, without referring to the statute, eleven of the factors enumerated in that Act) furnishes no basis for objec-

tion. Any rational determination of the issue of membership would necessarily have to take into account considerations of the kind which the court set forth—whether petitioner, at the critical dates, had subjected himself to the discipline of the Party, or had executed orders or plans of the Party, or had been called upon by the Party for services, or had taken part in the councils of the Party. These, of course, are the very things that a member ordinarily does, and that a non-member does not do.

VI

Petitioner argues that the trial court improperly allowed the government to determine unilaterally what materials in its possession constituted "statements" for purposes of production under 18 U.S.C. 3500 (the Jencks Act). The district judge, to be sure, permitted the government to determine whether the documents within its possession were "statements" within the terms of the court's orders to produce. That, however, is precisely the procedure which this Court approved in *Palermo* v. *United States*, 360 U.S. 343, 354, when it observed that "the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court." The trial court did not abdicate, in favor of the government, any of the responsibilities with which it was charged. Indeed, it turned over to the defense all of the relevant documents which the government produced (some of which were, perhaps, beyond the reach of the statute), and it permitted the defense to cross-ex-

amine government witnesses extensively to determine if those witnesses had made any other producible statements.

Petitioner further argues that the trial court erroneously viewed Section 3500 as inapplicable to a witness' statements made to congressional investigators or to government attorneys. The record shows, however, that the "statements" in question were not ordered to be produced because the statutory requirements were not met, *i.e.*, the documents were not written statements "signed or otherwise adopted or approved" or oral statements "recorded contemporaneously" in "substantially verbatim" form.

VII

It is also contended that the trial court abused its discretion in failing to examine or to direct the production of grand jury minutes—both the minutes of the grand jury which returned the indictment in this case and the minutes of other grand juries before which the government witnesses who appeared in this case had testified.

A. We urge, first, that petitioner did not follow the avenues available to him for laying a proper foundation. Petitioner established, on cross-examination, that the government's witnesses had testified in various grand jury proceedings, but petitioner made no effort thereafter to ascertain (1) whether they had testified concerning the events or episodes which had proved significant at the trial of this case, or (2) whether, if so, they claimed that their grand jury testimony on these matters was the same as their trial

testimony. Petitioner's premise—one which we dispute—was that, once it appeared that government witnesses had testified before a grand jury, the court had no choice but to breach the secrecy of the grand jury minutes.

B. The decisions of this Court establish, we submit, that the secrecy of grand jury proceedings is not to be broken except when there is "compelling necessity" shown in specific "instances" and with "particularity," *United States* v. *Procter & Gamble,* 356 U.S. 677, 682. There is no "absolute right" to disclosure; the trial judge is to determine, in his informed "discretion", whether "the ends of justice" require an exception to the rule that grand jury proceedings are to be maintained inviolate, *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400. We do not say that the defense has the burden of proving inconsistencies between trial testimony and grand jury testimony; but it does have the burden, as this Court emphasized in the *Pittsburgh Plate Glass* case, of showing, by such avenues as are available to it, that there is a "particularized need."

C. Moreover, with one belated exception, the demands for disclosure were not appropriately limited. Demands were sweepingly made for all testimony of the witnesses in question, before all grand juries, relating in any way to the subject matter of the instant proceedings. In the only instance in which a demand was limited to particular episodes of significance in the instant case, the demand was addressed to grand jury minutes in another case. A factor weighing against production in that instance was that the case in question was still in its pre-trial stages.

D. A further factor weighing against a grant of the petitioner's requests was that the defense had already received, for impeachment purposes, a great wealth of material in the form of extra-judicial statements and trial transcripts. These materials span the period during which the grand juries had functioned. As the Court of Appeals held, "In view of prior statements of these witnesses made available to the defense, in which there appeared no suggestion of material inconsistency, it is unlikely that their statements to the grand jury occurring at a time between the giving of such statements and consistent statements upon trial would produce impeaching material."

E. Petitioner argues that, even if production of grand jury testimony to the defense is not "automatic", there is an automatic requirement that the trial court, upon request of the defense, examine grand jury material and thereupon turn that material over to the defense if it is found to contain inconsistencies. We do not believe that the Second Circuit's practice, upon which petitioner strongly relies, goes so far as to rob the trial judge of all discretion. In all events, this suggestion is inconsistent with the approach adopted by this Court, which has imposed upon the defense the burden of showing a particularized need. To require the trial judge to examine extensive grand jury materials whenever the defense requests it would be an intolerable burden for the courts and would necessarily be disruptive of criminal trials. Whatever this Court concludes on the question whether there was an abuse of discretion on the particular facts of this case, it should preserve, we submit, a rule of discretion.

VIII

The disposition of the motions for new trial (post-trial motions which were grounded on alleged newly discovered evidence) was a matter in which the trial court had broad discretion. That discretion was not abused. Here, the "new evidence" related to matters completely extraneous to the issues in the case and had possible utility only as a means of seeking to impeach one of the government's witnesses (Gardner). Impeaching material will ordinarily not serve as a basis for granting a new trial, and the circumstances here are far from exceptional.

Thus, it is claimed that Gardner was untruthful (in another case) in testifying on the matter of service in the armed forces (an issue not material in that case). In the instant case, petitioner's counsel, in cross-examining Gardner, made no effort to explore the matter of his military history. And, in the very case in which that testimony was given, the trial judge determined, after a full post-trial hearing, that it was not given with an intent to falsify.

As to the discrepancy in Gardner's statements (made on various occasions) concerning the date of his second marriage, *i.e.*, whether it was in 1945 or in 1946, it appears (1) that the fact of variation in statements on this subject was known to petitioner at the trial and was in fact exploited, and (2) that Gardner's uncertainty on the point had an entirely rational explanation—the fact that the marriage was a common law marriage, rather than one formally celebrated.

ARGUMENT

I

VENUE WAS PROPERLY LAID IN THE DISTRICT OF COLORADO

The affidavits which led to the indictment in this case were admittedly executed in Denver, Colorado, and mailed from that city to Washington, D.C., the prescribed place of filing in the case of officers of international unions.[14] Petitioner contends that, on this state of facts, he was subject to prosecution only in the District of Columbia. The Government submits (as held below) that the offense was begun in Colorado, although completed in the District of Columbia, and that this case falls squarely within 18 U.S.C. 3237 (*supra*, pp. 7–8), which provides that an offense "begun in one district and completed in another" may be prosecuted "in any district in which such offense was begun, continued, or completed."

There are cases in which it is doubtless difficult to draw the line between what has been characterized as "mere preparation" and the beginning of an offense. This case does not present that difficulty for, at the very least, the offense had begun at the stage when the affidavits were irrevocably placed in the United States mails. Indeed, at that point, petitioner's active participation in the commission of the offense was at an end; he had placed the affidavits beyond his control and only a failure in the United States mails

[14] Local union officers may file either in the regional office or in Washington, D.C. See the Board's Regulations, 29 C.F.R. § 101.3.

or a loss of the letters at the place of receipt could have prevented the completion of the offense. In fact, the letters were received and filed in ordinary course, and the offenses completed.

There is a long line of authority which supports the view that, in the circumstances outlined, venue was properly laid in Colorado—a location which, from the standpoint of petitioner, was certainly no less convenient than a trial in the District of Columbia, 2,000 miles from his residence. In *United States* v. *Lombardo*, 241 U.S. 73, 77, this Court said: "Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act, commencing with the offender and hence ultimately consummated through him, as the mailing of a letter * * *."

A case closely analogous to the instant one is *De Rosier* v. *United States*, 218 F. 2d 420 (C.A. 5), in which the defendant was convicted under 18 U.S.C. 1001 of submitting a false statement to the Post Office Loyalty Board. He had signed and sworn to a letter in Florida and sent it to the Loyalty Board in Washington, D.C. Sustaining the Florida venue, the Fifth Circuit stated (pp. 422, 423):

> * * * When the letter containing the false statements and the fabricated document [to a false resignation from the Klu Klux Klan] was prepared and forwarded to the Loyalty Board, there was set in motion the events which cul-

> minated in the commission of the offenses charged. * * *
>
> * * * * * *
>
> Whether the letter was mailed or sent by some other agency, it is implicit in the verdict of the jury that, in addition to the signing and swearing to a false statement, the appellant put the false documents out of his possession and into some agency's custody for transmission to the Loyalty Board at Washington, D.C., all of which was done by him in the Southern District of Florida. Consequently, the offense was begun in that district, and it became indictable either at the place of its beginning or at the place of its completion.[15] * * *

Similarly, in *Bridgeman* v. *United States,* 140 Fed. 577 (C.A. 9), the defendant, an Indian agent in Montana, prepared false vouchers in that state and mailed them to the Commissioner of Indian Affairs in Washington. The court held that the venue was properly laid in Montana (p. 591):

> * * * [i]t is contended that the court below had no jurisdiction of the case, for the reason that whatever offense is charged was committed in the District of Columbia, and not in Montana. The answer to this is that the offenses were at least commenced in the State of Montana, and therefore come within the provisions of Section 731 of the Revised Statutes [now 18 U.S.C. 3237].

To similar effect, see *Ex parte Shaffenberg,* Fed. Case No. 12,696 (C.C. Col.); *United States* v. *Newton,* 68 F. Supp. 952 (W.D. Va.), affirmed, 162 F. 2d 795 (C.A.

[15] In *De Rosier*, as here, the appellant *was not required* to file the statement, but he was given an *opportunity* to do so.

4). See also *Burton* v. *United States*, 202 U.S. 344; *In re Palliser*, 136 U.S. 257; *New York Central & H.R.R. Co.* v. *United States*, 166 Fed. 267 (C.A. 2); *United States* v. *Uram*, 148 F. 2d 187 (C.A. 2); *United States* v. *Downey*, 257 Fed. 366 (D. R.I.).

Petitioner's position does find support in the majority opinion in *United States* v. *Valenti*, 207 F. 2d 242 (C.A. 3), in which the court reasoned (p. 244) that "the act having legal significance is the filing of the noncommunist affidavit with the Board" and that the matter is not "within the jurisdiction of the Board" until the filing takes place. In our view, however, it is immaterial that the Board's jurisdiction attaches only when the affidavit is received and placed on file. The question is not whether an offense occurred at the moment when the affidavit was dropped in the mail; the question, rather, is whether that act marked the *beginning* of the offense. The answer is that it did because, at that point, the defendant had irrevocably set in motion and placed beyond his control the train of events which would normally result (and here did result) in the consummation of the offense. As Judge Hastie stated in his separate opinion in *Valenti* (p. 246), "* * * at that point [mailing] I think the offense was 'begun' with the result that when, thereafter, the offense was completed it became indictable either at the place of its beginning or the place of its completion."[16]

[16] Judge Hastie concurred in the result reached in *Valenti* on the limited ground that the Government had not adequately shown that the mailing occurred in the district where venue

The view expressed by Judge Hastie is the settled view—a view, as noted above, which finds clear support in the prior decisions of this Court and has long been followed by the federal courts generally.

II

THE "TWO-WITNESS" RULE APPLICABLE IN PERJURY CASES DOES NOT APPLY TO PROSECUTIONS UNDER 18 U.S.C. 1001

Petitioner contends that the district court erred in refusing to instruct the jury that in order to convict they had to find that the falsity of the affidavits was proved by the testimony of two witnesses or of one witness plus corroborating circumstances; in short, that the court should have followed the "two-witness" rule applicable to prosecutions for perjury, a rule described in *Weiler* v. *United States*, 323 U.S.

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was laid. On this view of the facts, the result reached in *Valenti* was, of course, a correct one.

Reass v. *United States*, 99 F. 2d 752 (C.A. 4), and *United States* v. *Borrow*, 101 F. Supp. 211 (D. N.J.), cited in the majority opinion in *Valenti*, are clearly distinguishable from the instant case. In each of those cases, a letter or statement was prepared in one district and the defendant personally carried it to another district, where he filed it with the governmental agency concerned. Accordingly, the defendants involved did not place the documents beyond their control until the filing took place. Indeed, in *Reass*, the court seemingly recognized that the result would have been different if the document had been mailed from outside the district of filing.

Cases of failure to file as required by law are likewise distinguishable; in such situations the situs of the crime is the place where the law requires that the act be performed. *Johnston* v. *United States*, 351 U.S. 215, 220; *Bowles* v. *United States*, 73 F. 2d 772 (C.A. 4), certiorari denied, 294 U.S. 710; *New York Central & H.R.R. Co.* v. *United States*, 166 Fed. 267 (C.A. 2).

606, as a "special rule which bars conviction for perjury solely upon the evidence of a single witness" 323 U.S. at 608–609.

The "two-witness" rule is not statutory; it traces back to the common law. In *Weiler,* the Court explained its rationale as follows (p. 609):

> * * * Lawsuits frequently engender in defeated lititants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions.
>
> The crucial role of witnesses compelled to testify in trials at law has impelled the law to grant them special considerations. * * * Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon "an oath against an oath." The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

As a special rule governing the quantum of proof required in perjury cases, the "two-witness" rule, as the Court indicated in *Weiler,* rests in large part upon historical considerations; it is not a constitutional requirement and may be altered, qualified, or abrogated by Congress. See *Weiler* v. *United States, supra,* at 609–610, and *Hammer* v. *United States,* 271

U.S. 620,[17] cited and quoted in *Weiler*." The policy of the rule that witnesses "compelled to testify" should be protected does not apply to the case of an affidavit filed under Section 9(h) of the Taft-Hartley Act, for that Act compelled no one to file an affidavit, true or false.

In the Taft-Hartley Act, Congress, had it chosen to do so, could have made the filing of a false affidavit punishable as perjury, an approach which it has adopted in some comparable instances. See 5 U.S.C. 789; 13 U.S.C. 213; 22 U.S.C. 703; 26 U.S.C. 6065; 7206; 38 U.S.C. 787; 46 U.S.C. 22, 170(13), 231. It chose, however, to make the filing of a false non-Communist affidavit answerable under the provisions of Section 1001, the "false statement" statute.

Section 1001 and its predecessor statutes have now been on the books for nearly a hundred years and in all that time, so far as we can determine, it has seldom been suggested, and never held, that the filing of a false statement with the Government is subject to the perjury two-witness rule in instances where the Congress has not defined the offense as perjury. See the legislative history of Section 1001 as discussed in *United States* v. *Bramblett*, 348 U.S. 503, 508.

The courts of appeal which have considered the application of Section 1001 to affidavits filed under the Taft-Hartley Act have uniformly rejected the contention that the perjury rule should be applied. See, in addition to the holding below, *Fisher* v. *United*

[17] *Hammer* v. *United States*, 271 U.S. 620, applied the rule to a prosecution for subornation of perjury because unless perjury was proved there could be no subornation.

States, 231 F. 2d 99, 105–106 (C.A. 9); *United States* v. *Killian*, 246 F. 2d 77 (C.A. 7); *Fisher v. United States*, 254 F. 2d 302 (C.A. 9), certiorari denied, 358 U.S. 895; *Sells* v. *United States*, 262 F. 2d 815, 821 (C.A. 10), certiorari denied, 360 U.S. 913; *Gold* v. *United States*, 237 F. 2d 764 (C.A.D.C.), reversed on other grounds, 352 U.S. 985.[18]

Apart from statute, the perjury rule has been applied only to cases of false testimony. Since Congress may lay down rules of evidence for the federal courts (*Palermo* v. *United States*, 360 U.S. 343) and since the "two-witness" rule is not a constitutional requirement, the deliberate action taken by Congress in making the filing of a false Taft-Hartley affidavit punishable under Section 1001, rather than under the perjury statute, carries the consequence that the special perjury rule does not govern.

III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT

A. There is no substance to petitioner's contention that the evidence is insufficient to support the jury's finding that the affidavits were false. The jury was fully justified in finding, on the basis of the evidence reviewed above (pp. 11–21), that petitioner's pre-1949 membership in the Party—which is undisputed—was not terminated by his so-called "resignation" of August 1949, but continued uninterrupted

[18] In *Gold*, the only opinion filed was one by Circuit Judge Bazelon, who thought that the conviction should be reversed and the perjury rule applied. The court of appeals affirmed the conviction in that case by an evenly divided court, four to four.

beyond that date and beyond the dates of both the affidavits in issue (December 19, 1951 and December 3, 1952).[19] Cf. *Hupman* v. *United States*, 219 F. 2d 243, 248 (C.A. 6), certiorari denied, 349 U.S. 953; *Jencks* v. *United States*, 226 F. 2d 540, 547–548 (C.A. 5), reversed on other grounds, 353 U.S. 657; *Fisher* v. *United States*, 231 F. 2d 99, 103 (C.A. 9); *Bryson* v. *United States*, 238 F. 2d 657, 663 (C.A. 9), certiorari denied, 355 U.S. 817.

Petitioner's membership in the Communist Party was traced back to at least 1942 (R. 41–42). The evidence showed that petitioner carried out the Party's instructions in formulating the policy of Mine-Mill (R. 43, 44, 45). Petitioner in 1946 became a member of the "Steering Committee" whose purpose it was to co-ordinate Party activities within the Union (R. 47). The "Steering Committee" met "very frequently" (R. 49) and was usually presided over by petitioner "or some other ranking Communist official" (R. 51).

After the passage of the Labor Management Relations Act, 1947 (61 Stat. 136), a large group of leading Party members who held offices in labor unions, including petitioner, met in New York City for the

[19] Since petitioner's prison sentences on the "affiliation" counts were made to run concurrently with his prison sentences on the "membership" counts and since the fines which he received were imposed only on the "membership" counts (*supra*, p. 9) there is no need to consider the sufficiency of the evidence under the "affiliation" counts. *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Pinkerton* v. *United States*, 328 U.S. 640, 641–642, fn. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Brooks* v. *United States*, 267 U.S. 432, 441.

purpose of formulating a Party policy with respect to the affidavit requirement of the new Act The policy originally adopted was to refrain from filing affidavits (R. 83–89). Petitioner indicated his dissatisfaction with this policy but adhered to the Party line (R. 88–89). Petitioner related this policy to his fellow Communist Mine-Mill officers a few weeks later (R. 88–89) and participated in a discussion of how the law might be circumvented (R. 91–92).

Mine-Mill followed the policy advocated by the Party until July 1949. At that time, the Union decided to comply with the affidavit requirement because Mine-Mill had lost a number of elections (R. 457–459, 460–462).

A few days after the decision to comply with the affidavit requirement, petitioner told government witness Mason that he would "resign from the Party" in order to maintain his Union office (R. 463–464). He showed Mason a statement and informed him that it had been cleared with the Party people in New York (R. 463–465). The August 15, 1949, issue of the Union paper contained an article by petitioner announcing that he had "resign[ed] from the Communist Party, of which I have been a member, in order to make it possible for me to sign the Taft-Hartley affidavit" (G. Ex. 8, R. 890). The exact date of the "resignation" does not appear from the record, nor does the record contain any document purporting to constitute the resignation.

In the fall of 1951 (after petitioner's alleged resignation), on the occasion of petitioner's first meeting with Government witness Fred Gardner, petitioner admitted to Gardner his continued membership in the

Communist Party. Petitioner told Gardner that he (Gardner) had come to Mine-Mill with "excellent recommendations" from "the Communist Party of Cleveland" (R. 443). Petitioner related to Gardner that he (petitioner) had had difficulty in crossing the border into Canada because of his "membership in the Party" and "public resignation" therefrom (R. 443). He confided to Gardner that his formal resignation from the Party in 1949 was not an actual resignation and termed it a "mistake" because it had provided the "enemies of the Party" with an opportunity to point out that it was not a "true" resignation (R. 441–445, 445–446).

In March 1952,[20] the Communist labor union leaders delegated to petitioner the assignment of communicating with one Salon, a leader of the World Federation of Labor Unions, in Paris. The Soviet delegation to this organization, meeting in Paris, was attempting to force the "American left-wing" unions to form a "third federation." The decision whether to do this had been delegated by the American Communist Party to the unions themselves. After discussing the problem, the officers of the "left-wing unions" decided that they were not in favor of such a move and assigned to petitioner the task of informing the World Federation of Labor Unions of this decision (R. 465–470).

In March 1953, a staff conference of Mine-Mill was held in Denver, Colorado (R. 468–470). The pro-

[20] This date falls between the execution of the first (December 19, 1951) and second (December 3, 1952) affidavits filed by petitioner.

posed agenda for this conference contained a "legislative program" which listed a number of items such as "repeal of the McCarran Act" and the "fight against witch hunting." When petitioner's attention was called (by witness Mason) to the fact that the Union's legislative program listed no matters pertaining to the betterment of working conditions, petitioner admitted the error and directed the insertion of additional matters in the program (R. 468–471). He told Mason, however, that "these other things too like repeal of the McCarran Act are important" because "[w]hen they get us Communists they will be after people like you if we don't get these laws repealed" (R. 471–472).

In June 1953, witness Gardner was transferred by Mine-Mill to a new assignment in the Coeur d'Alene Mining District of Idaho. Petitioner instructed him to stop off in Denver on his way to Idaho for a "briefing." (R. 445–446). At a meeting in petitioner's home in Denver, petitioner told Gardner the particulars of a factional dispute between Mine-Mill Party members in the Coeur d'Alene area and warned him that for this reason he should "remain aloof" from any Party activity until further notified. He also told Gardner that he felt certain that the dispute would be resolved by the expulsion of certain persons from the Party and that Gardner could reactivate himself in the Party upon being contacted by someone whom petitioner would identify to him beforehand (R. 446–448).

In a conversation with petitioner in August 1953, at Butte, Montana (R. 475–476), witness Mason ac-

cused petitioner and his Party-member subordinates in the Union of trying to undermine the leadership of the Union's District No. 1 in the midst of a bargaining conflict with employers in that area, because the District No. 1 leadership was opposed to Communist domination of Mine-Mill. Mason stated that he recognized that petitioner was the leader of the Party in the Union and was talking to him in that capacity, warning him that the Party's tactics had made some of the Union's leadership in Montana angry. Petitioner did not deny these accusations, but apologized to Mason and told him that he had pursued this policy because he had been misinformed by Clark, the Union's President. At one point in the conversation, petitioner offered to resign his office as Secretary-Treasurer and at another he asked Mason to come to Denver to discuss these difficulties with him and other Communist Party members in the Union (R. 477–479).

In a sequel to this conversation, which took place in Denver (R. 480–481), Mason reverted to the matter discussed in Butte and stated that conditions within the Union caused by Communist domination, such as the policy of the Union paper of constantly criticizing the foreign policy of the United States, should be changed to conform to the thinking, aims and aspirations of the rank and file membership. Petitioner advised Mason that the position the latter had outlined was "in direct opposition to the Party and that his suggestion that the Policy of the paper be changed was not "realistic." He went on to state that the Party leadership in the Union, including himself, felt

that there should be "no compromises" because there had been "too many compromises already." He noted that "the Soviet Union is becoming stronger," and that this was true also of the "position of the Communist[s] in the Union," who, along with other Communists, had been able to "repulse the raid and hold this union and other unions" (R. 482–484). When Mason threatened an open fight on the Communist issue, petitioner pointed out that he would have the machine and the paper to use against Mason in such a fight. He concluded the conversation by telling Mason that he (Mason) had been "invited to get into the Party" and that "had [he] done so" he "would be sitting high in the councils of this organization with us" (R. 484–485).

B. Petitioner argues that the evidence consists mainly of oral admissions on his part in six conversations with two men, and that oral admissions are always received with caution in criminal cases, especially where there is little or no independent corroboration, for which he cites *Opper* v. *United States*, 348 U.S. 84, 90–93. The *Opper* case, however, is clearly distinguishable from the case at bar. That case dealt with the question of the quantum of evidence, corroborative of an extra-judicial admission or confession to law enforcement authorities, required to sustain a conviction. The requirement that there be some such corroborative evidence—and very little is required (see 348 U.S. at 92–93)—is founded on the law's concern lest a conviction be based solely on an untrue admission or confession induced by fear, coercion, or hope of leniency. Wigmore, *Evidence* (3d ed.

1940), §§ 821, 822, 2071; 2 Wharton, *Criminal Evidence* (12th ed. 1955), §§ 393–394, 372–383; *Bram* v. *United States*, 168 U.S. 532, 562–564; *Wilson* v. *United States*, 162 U.S. 613, 622–623; *Opper* v. *United States*, *supra*; *Smith* v. *United States*, 348 U.S. 147, 153. Petitioner's admissions, on the other hand, were of an entirely different sort, having been made prior to arrest and to private individuals, rather than to law-enforcement authorities. The rule requiring corroboration of admissions or confessions is thus inapplicable. In addition, we point out that petitioner's admissions were amply corroborated by the extensive evidence of his activities as a Party member.

Petitioner argues (Br. 47) that because the evidence of his acts as an admitted Party member related to preresignation events, it cannot corroborate the proof that he was still a member of the Party at the time he signed the affidavits. But as a matter of logic and of common experience it is clear that the evidence relating to the pre-resignation period showed the nature of petitioner's membership (whether active or inactive) and the extent of his adherence to the Communist program. This evidence overwhelmingly showed that petitioner was an active and disciplined member of the Party, and that he zealously cooperated with high ranking Communist officers in organizing the "Steering Committee" and in "steering" the Union in accordance with the policies and dictates of the Party. He was shown to be a dedicated and active Party member, not merely a technical or casual one. This evidence also demonstrated that the Party had a policy that "once having joined the Communist

Party you could not leave without being expelled" (R. 117–118), and that petitioner was cognizant of the Party's policy (R. 463–464). Thus, the proof of petitioner's pre-resignation activities not only corroborated the admissions that petitioner made to Gardner and Mason, but removed any ambiguity which might have surrounded those admissions.

IV

THERE WAS NO PREJUDICIAL ERROR IN THE ADMISSION OR EXCLUSION OF EVIDENCE

Petitioner argues a number of questions as to the admission or exclusion of evidence and as to the limitations imposed on cross-examination. All of the rulings which petitioner challenges were, we submit, within the discretion of the trial judge, and there is no showing of an abuse of discretion or of prejudicial error.

A. THE TESTIMONY AS TO PETITIONER'S PAST (PRE-1951) MEMBERSHIP IN THE COMMUNIST PARTY

Government witness Eckert testified as to petitioner's membership and activities in the Communist Party from 1942 to 1948. Petitioner objected to the admission of the testimony on the ground that he had offered to stipulate that he was a member of the Party from 1941 until August 1949, and that the evidence as to his membership and activities during the 1942–1948 period would be prejudicial and inflammatory (R. 19, 20, 802). The claim is made that testimony as to his Communist activities would tend so strongly to prejudice the jury against him that it should have been excluded, even if relevant.

It is true that what the prosecution had to prove was that petitioner was a member of the Communist Party on December 19, 1951, and December 3, 1952. But to do this the prosecution was certainly entitled to show the nature of petitioner's membership and the extent of his activities as a Communist in the union. In determining whether the purported resignation was authentic, it was highly relevant that petitioner had been an active and disciplined member of the Party, and (as we have pointed out) that he had zealously cooperated with high-ranking Communist officers in organizing the "Steering Committee" and in "steering" the union in accordance with the policies and dictates of the Party. Taking the testimony of petitioner's 1942–1948 activities together with the testimony as to his statements and activities after 1952, the jury could properly infer that his "resignation" in 1949 was a pretense designed to present an appearance of compliance with the requirements of the Taft-Hartley Act. Taking into account the whole story of petitioner's dedication to the Party and the nature and extent of his activities, including "the time element and other factors," the inference of petitioner's Party membership in 1951 and 1952 was a compelling one. See *Maggio* v. *Zeitz*, 333 U.S. 56, 65; *Hupman* v. *United States*, 219 F. 2d 243, 248 (C.A. 6), certiorari denied, 349 U.S. 953.

Petitioner's offer to stipulate the bare fact of his Party membership from 1942 to 1948 could hardly prove what the Government sought to establish. *Jones* v. *Allen*, 85 Fed. 523 (C.A. 8); *McHenry* v. *United States*, 276 Fed. 761 (C.A.D.C.). The Gov-

ernment was entitled "to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight." *Dunning* v. *Maine Central Railroad Co.*, 91 Me. 87, 97, 39 Atl. 352, 356. Moreover, the significance of bare membership would fall far short of that attaching to proof that petitioner was a prominent, active, zealous and dedicated member—one likely to wish to continue in the Party.

The evidence being highly relevant, petitioner has the burden of showing that its admission was an abuse of discretion. Wigmore, *Evidence* (3d ed. 1940), § 2591. Petitioner's argument that the testimony concerning his Party activities was so prejudicial and inflammatory that it deprive him of a fair trial obviously goes too far. On his argument, a factual recital of Communist activity in a labor union would necessarily be so provocative and prejudicial as to inflame the jury; and no Communist could have a fair trial in any case involving Party membership. But see *Dennis* v. *United States*, 339 U.S. 162.

B. ECKERT'S TESTIMONY AS TO THE "NO-RESIGNATION POLICY"

Petitioner also objects to the admission of Eckert's testimony that, on the basis of his long experience (17 years) in the Party, he knew that its policy was that "once having joined the Communist Party you could not leave without being expelled" (R. 117–18).

Of course, as the trial court properly charged the jury (R. 71), for purposes of Section 9(h) and for

the purposes of this case, "membership" in the Communist Party is a matter of mutual consent; if petitioner had submitted to the Party a *bona fide* resignation, he would not be guilty of a false affidavit whether the Party accepted his resignation or not. But in the instant case, in addition to Eckert's testimony as to the "no resignation" policy, there was testimony from which the jury could infer that Travis knew about the Party's policy and intended to comply with it. Mason testified that petitioner told him in July 1949 that he had "cleared" his resignation statement "with Ben Gold and the Party people in New York" (R. 463–464). Taking that testimony with Eckert's account of the Party's "no resignation" policy and Gardner's testimony that in 1951 petitioner told him that his "public resignation was a mistake because * * * the enemies of the Party recognized that this was not an actual resignation" (R. 444–445), the jury was justified in inferring that the petitioner, a man conversant with the policies of the Party, knew of the policy Eckert described and that he intended only to give the appearance of resigning.[21]

[21] The trial court recognized that the "policy" had to be connected up with petitioner. The court stated, "[W]hat I understand by 'connection' is that there will be evidence from which the jury can infer that Mr. Travis was fully acquainted and had personal knowledge of this policy" (R. 11[1]). The court also stated, "[I]f that evidence [of Mason and Gardner] is considered along with all the other evidence about Travis' association with the Communist Party, that an inference could be drawn from the evidence that he did know of this policy of resignation and that was inherent to the discussions" (R. 790–791).

Petitioner also suggests that Eckert was not qualified as an expert and that the policies of the Communist Party do not call for expert testimony. But the court and counsel both treated Eckert as an expert witness (Tr. 86, 155–156; R. 790–791), and it is well settled that the doctrines and practices of the Communist Party are a proper subject of expert testimony. *United States* v. *Dennis*, 183 F. 2d 201, 229 (C.A. 2), affirmed, 341 U.S. 494; *Frankfeld* v. *United States*, 198 F. 2d 679, 689 (C.A. 4), certiorari denied, 344 U.S. 922.

C. LIMITATIONS ON THE CROSS-EXAMINATION OF GOVERNMENT WITNESSES

Petitioner argues that his cross-examination of Government witnesses was improperly restricted. He contends, first, that the trial court erred in refusing to permit a line of inquiry calculated to show that witness Mason, in becoming an informant for the Government in 1952, was motivated by fear of denaturalization and the hope that he would be accorded immunity if he aided the Government. Secondly, he challenges restrictions on cross-examination of witnesses Eckert and Gardner designed to show rivalry between the labor organizations by which these witnesses were employed and Mine-Mill, petitioner's union. The rivalry, he contends, would have tended to show bias and hostility on the part of these witnesses toward petitioner. In both instances, we believe that the trial judge acted well within the bounds of his discretion.

(1) At the trial, the defense elicited from Mason (on cross-examination) that he was a naturalized

citizen, having acquired citizenship in 1938 (R. 736–738). Mason had previously testified on direct that he had been a member of the Communist Party for a short period in the early 1930's (R. 455, 737–738). The cross-examination also revealed that Mason had been questioned about his past membership in the Party by the Immigration and Naturalization Service in 1938 (R. 737–739). The defense then attempted to ask the witness whether he had been questioned by the Service again about this same matter in 1952 (R. 738–739). An objection to this question was sustained (*ibid.*).

In the colloquy which followed in chambers, the defense told the court it wished to attempt to show that Mason had again been questioned about his past Party membership by the Immigration and Naturalization Service in 1952; that, at that time, he (Mason) knew that Congress, in 1950, had enacted a statute (the McCarran Act) which permits the deportation of aliens who have been members of the Communist Party; that he also knew that the immigration laws provide for the denaturalization of those who obtained citizenship by fraud; and that, as a result of this situation, he knew or believed that he was subject to denaturalization followed by deportation. The defense further stated that it was attempting to show that because of these circumstances Mason agreed under duress to become an informant for the FBI. Petitioner based his right to pursue this inquiry on the asserted right of a defendant to show on cross-examination that a Government witness has an interest in testifying (R. 739–741). After being questioned

by the court regarding the basis of petitioner's claim that promises or threats had been made to Mason (R. 741–742), petitioner's counsel explained that he had no knowledge of promises or threats, but said that he had been informed that during the pertinent period the witness "was going around asking people questions about his status as an alien" (*ibid.*) and was "very, very concerned with that problem" (R. 743–744). In sustaining the Government's objection, the court stated (*ibid.*):

> I do not think the inference is warranted, the inference [that] there were threats or there was any deal made or anything, however you wish to designate it in what you have just stated, and except for that I am convinced that the evidence is entirely irrelevant.

There is no doubt that the accused in a criminal case may seek to show by cross-examination that the testimony of a Government witness is biased because it is given under promise or expectation of immunity or under the coercive effect of his detention by Government officers. *Alford* v. *United States,* 282 U.S. 687, 693; *Spaeth* v. *United States,* 232 F. 2d 776, 778–779 (C.A. 6); Wigmore, *Evidence* (3d ed. 1940), § 967. But there must be some reasonable basis for an inference of bias or favor, *e.g.,* a showing that the witness might have committed a crime, or was in custody, or was at any rate in a position where he would have need to look for leniency. In the instant case, the evidence was that Mason had admitted his past membership in the Party to the Immigration and Nat-

uralization Service in 1938,[22] *before he was naturalized.* Thus, the evidence *negated* any supposition that in 1958 he was in danger of a denaturalization proceeding based on fraud.[23]

(2) Petitioner also complains that the district judge restricted his cross-examination of witnesses Eckert and Gardner with respect to rivalry between the unions by which they were employed at the time of the trial and Mine-Mill. Both Eckert and Gardner had been former officials of Mine-Mill (R. 355, 437–438). At the time of the trial, Eckert was employed by the United Automobile Workers (UAW), and Gardner by the Hod Carriers' Union (R. 26–27, 437–438). The cross-examination in question sought to develop the theme that these two witnesses, because their unions were rivals of Mine-Mill in regard to representation of various locals and in elections before the N.L.R.B., were prejudiced against petitioner in his capacity as a Mine-Mill leader (R. 355–356, 568–569).

The settled rule is that evidence to show hostility of a witness toward an accused must be direct and positive, not remote, indirect and uncertain. Baer and Ballicer, *Cross-Examination and Summation* (1933), § 20; 5 Jones, *Evidence* (2d ed. 1926), § 2352. It is proper, and usually necessary, for the court to limit cross-examination which aims only at showing bias or

[22] He also admitted his past membership when questioned again by the Service in 1952 (R. 738–742).

[23] The provision of the Immigration and Naturalization Act (8 U.S.C. 1251(a)(b)(c)) making past membership in the Communist Party a ground for deportation applies only to aliens. *Galvan* v. *Press*, 347 U.S. 522.

hostility. And the exclusion of questions which at most would have only a slight bearing on the issue of a witness' bias or credibility is not reversible error. *District of Columbia* v. *Clawans*, 300 U.S. 617, 632.

To make out a persuasive connection between the alleged union rivalry and the credibility of the witnesses against petitioner, the jury would not only have had to find hostility between the unions, but would also have been obliged to infer that the rivalry or hostility carried over to personal relationships. Whether the unions were in fact hostile was, at least in the case of the union employing Gardner, in dispute. To support petitioner's claim that the restriction of cross-examination was improper and an abuse of discretion, the Court would have to say that petitioner should have been permitted to establish the alleged inter-union hostility by extensive cross-examination on that collateral and extraneous issue. If that had been permitted, the Government would have been entitled to attempt to disprove the rivalry on re-direct, or to attempt to establish that the competition between UAW and Hod Carriers with Mine-Mill was no more violent than their competition with other unions, or, for that matter, with each other. The likely result would have been that the issue of petitioner's guilt or innocence would have been entangled in a mass of evidence as to trade-union rivalry. The district court, we submit, properly exercised its discretion in ruling this out, and in restricting the cross-examination to matters having a reasonable degree of proximity to the issues raised by the indictment.

V

THE "MEMBERSHIP" INSTRUCTION WAS CORRECT

In its instruction to the jury on the meaning of "membership" in the Communist Party, the district court incorporated eleven of the fourteen "criteria" of membership listed in Section 5 of the Communist Control Act of 1954, 50 U.S.C. 844, and told the jury that "[t]hese are some of the indicia of Communist Party membership" (R. 872). The judge also instructed the jury to consider "all the evidence" bearing on the question (R. 872).

Petitioner attacks the constitutionality of Section 5 and claims that the charge permitted the jury to find guilt on the basis of a single item of evidence coming within one of the "criteria" and that the criteria themselves are so vague and imprecise that their use amounted to a denial of due process.

This is not a prosecution under the 1954 Act, however, and the court's charge merely used the "indicia" to illustrate the type of fact which one would take into account in any ordinary process of reasoning in determining whether the petitioner was a "member" on the critical dates.

The court made it clear to the jury that petitioner could not be convicted merely because, at some time prior to the affidavits, he had been a member of or affiliated with the Party, and that a verdict of guilty could not be predicated on "isolated" acts or statements showing cooperation or sympathy with the Party (R. 871). The charge, in language based on the concurring opinion of Mr. Justice Burton in

Jencks v. *United States*, 353 U.S. 657, 679, emphasized that to find that petitioner was a member of the Party (on the dates of the affidavits) one must conclude that he desired to belong to the Party and that the Party considered him a member. To decide that question it was obviously necessary for the jury to take into account such matters as whether petitioner had subjected himself to the discipline of the Party, had executed orders or plans of the organization, had been called upon by the organization for services, and had taken part in the councils of the Party. Those are the very things that a "member" usually does and that nonmembers do not ordinarily do. No single item is conclusive, but under the instructions given the jury could find, and find properly on the basis of an accumulation of acts and statements, that the petitioner was a member of the Communist Party on the dates when he swore that he was not.

It is significant that petitioner cites no authority for his argument that the charge on membership was vague. In other cases involving Party membership, charges similar in all relevant essentials to that of Judge Knous have been held sufficient and proper. See, *e.g.*, *Fisher* v. *United States*, 231 F. 2d 99, 106–107 (C.A. 9); *Lohman* v. *United States*, 251 F. 2d 951, 954 (C.A. 6).

In *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531, 558–561 (C.A.D.C.), reversed on other grounds, 351 U.S. 115, similar objection was raised with respect to Section 13(c) of the Subversive Activities Control Act (50 U.S.C. 792

(e)). Section 13(e) directs the Subversive Activities Control Board to take into consideration, in determining whether an organization is a Communist-action organization required to register under the Act, eight evidentiary factors listed therein. The Party claimed that the Section violated due process because these factors were irrelevant, vague and lacking in rational relation to the derivative facts to be established. In rejecting the argument the court of appeals said (at p. 559):

> * * * Having made these several findings [enumerated in Section 13(e)], the Board must distil from the composite an ultimate finding whether the respondent is or is not under foreign control, etc. There is nothing unusual about this process; indeed it is quite elementary. It is a familiar process of adjudication based upon fact-finding. Frequently a case discloses numerous basic facts established by the evidence, upon which the trial tribunal exercises its reasoning power and deduces a derivative or ultimate finding * * *.
>
> Moreover this catalog in Section 13(e) is not exclusive. These eight items must be considered, but others which are relevant and of material effect and are offered in competent form must be considered also. Nothing in the statute hints at an exclusive criterion. The Board should, and so far as we can tell did, admit and consider whatever is competent, relevant and material.[24]

[24] Petitioner contends that Section 5 of the 1954 Act should be considered as *ex post facto* legislation if applied to this case. But the enumeration by Congress of types of evidence which it considers to be germane to the determination of mem-

VI

THE DISTRICT COURT DID NOT ERR IN ITS RULINGS UNDER 18 U.S.C. 3500

In *Palermo* v. *United States*, 360 U.S. 343, this Court, referring to Section 3500 (the Jencks Act), stated (p. 354):

> The statute itself provides no procedure for making a determination whether a particular statement comes within the terms of (e) and thus may be produced if related to the subject matter of the witness' testimony. Ordinarily the defense demand will be only for those statements which satisfy the statutory limitations. Thus the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court * * *.

At the trial, petitioner's counsel made requests, after the testimony of each government witness, for the production of "statements" given by the witness to agents for the government. In each instance, certain documents were thereupon produced.

The trial court ruled (R. 221–233), during the defense's cross-examination of the government's witnesses, that the defense would have an opportunity to attempt to lay a foundation for the production of additional documents (R. 118–120, 448–450, 486–487) by examining the witnesses out of the presence of the

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bership in the Communist Party, when the evidence so described is relevant and probative by ordinary processes of reasoning, is not *ex post facto* legislation. See *Fisher* v. *United States*, 231 F. 2d 99, 107, fn. 2 (C.A. 9); cf. *Calder* v. *Bull*, 3 Dall. 386, 390.

jury, and that the court would then rule on the question whether there were any additional statements within Section 3500(e). This procedure was followed. Each of the government's three witnesses was cross-examined extensively in regard to his interviews and conversations with agents of the government. He was asked whether notes were taken, whether he had signed any document, and so on (R. 155–195, 195–223, 255–270, 273–290, 345–354, 372–384 (Eckert); R. 599–626, 631–655 (Gardner); R. 750–780 (Mason)). At various stages during such examination and at the completion of each interrogation, the defense moved for the production of additional documents (R. 251–252, 270–271, 384–385, 390, 655–656, 657–658, 780). The court denied the motions on the ground that the defense had failed to show that the witnesses had made statements (other than those statements already produced) which were within the definition of "statement" appearing in Section 3500(e) and were related to the subject matter of the witness' direct testimony (R. 252–253, 270–271, 390–391, 656–658, 780–782).

The petitioner attacks this procedure on the ground that the court ruled that the prosecution could determine unilaterally what materials in its possession constituted "statements" for purposes of Section 3500(e). The argument rests upon a misreading of the record. Of course, as this Court pointed out in *Palermo* (*supra*, p. 69), the government must, in relation to each document, make the initial determination whether a document is a "statement" within the terms of the court's order. With respect to "statements"

by Eckert and Gardner, the government produced for the court's inspection a number of documents. After these had been submitted to the court, but before they were turned over to the defense pursuant to subdivision (e), the prosecuting attorney suggested that some of the documents produced were not "statements" as defined by subsection (e) and asked the court to reconsider whether they were within Section 3500 (R. 488–489, 492–493, 493–494). The court declined, stating (R. 490):

> * * * I want to point out that under 3500 I don't see any contemplation in here of the Court's determination after you have submitted the matters as statements of whether they are statements or not. It is the Court's sole duty under 3500 where you have produced the material to simply excise the portions of said statement which do not relate to the subject matter of the testimony of the witness.

The court's subsequent remark that "[w]hat is produced in the first instance is a matter that you [*i.e.*, the government] determine" (R. 492) was made in the context just described, and clearly applied only to the situation where the government had already produced documents, for the court had already ruled that the defense could cross-examine to determine whether additional statements should be ordered produced (R. 221–233). Obviously, under the language of Section 3500, the government must make an initial determination as to what an order to produce under that section requires. The trial court, however, did not abdicate its ultimate authority to decide what

should be produced, at least for purposes of an *in camera* inspection.[25]

Petitioner's additional argument that the trial court erroneously interpreted Section 3500 as not applying to statements made to an investigator for a congressional committee or to statements made to government attorneys stands on no better footing. The record shows that the court refused to order the production of such "statements" because the defense had failed to show that the witnesses, in their interviews and conversations with congressional investigators and government attorneys, had "signed or otherwise adopted or approved" any written statement on the subject matter of their testimony, or had made any oral statements which were recorded "contemporaneously" and "substantially verbatim" (R. 270–271, 384–391, 655–658, 780–782).[26]

VII

THE DISTRICT COURT PROPERLY DENIED PETITIONER'S MOTIONS FOR PRODUCTION OF THE GRAND JURY TESTIMONY OF THE PROSECUTION'S WITNESSES

A. In contending that the district court erred in failing to grant access to grand jury minutes (the minutes of the grand jury which returned the indictment in this case and those of other grand juries be-

[25] In *United States* v. *McKeever*, 271 F. 2d 669, 674 (C.A. 2), the court approved the procedure of a *voir dire* examination to determine whether reports were producible.

[26] For factual support of the court's rulings, see R. 217–221, 255–258, 273–290, 345–354, 372–384, 623–626, 631–655. It should be noted that in at least one instance the defense had, and used, a transcript of a witness' testimony before a committee (R. 132–133, 750–780).

fore whom the prosecution's witnesses had testified), petitioner argues (Br. 32) that "the trial judge sustained the prosecution's objections to questions put by the defense (R. 403–404, 530–535, 538, 686–687) to the prosecution witnesses, the purpose of which was to ascertain whether or not they had testified to the grand jury with respect to particular episodes which they testified about at the trial—a ruling which was erroneous and prejudicial in itself, quite apart from its bearing on the matter of access to the minutes." The same contention was advanced in the petition for certiorari (pp. 26–28). As we earlier pointed out in our brief in opposition (pp. 23–24), this is not borne out by the record. In the instances cited by petitioner for the proposition that the trial judge cut off interrogation as to testimony previously given before grand juries, the court did so because the questions were deemed improper in form, scope, or purpose. Whether or not these rulings were uniformly correct, the significant point is that at numerous other places in the record (which petitioner persists in ignoring) petitioner's counsel did ask each of the government's witnesses whether they had testified before grand juries in relation to petitioner, and the questions were allowed and answered. In an appendix to our brief in opposition (pp. 26–33), we have set forth the text of the pertinent excerpts.[27] It should be observed that in each instance petitioner dropped the matter after ascertaining that the witness had testified before grand

[27] The citations appearing at pages 26–33 of the brief in opposition are to the original transcript of record. The same material now appears, however, in the printed record.

juries. No effort was made to ask whether the witness had testified as to particular events or episodes which had become relevant or crucial at the trial. Nor were any of the witnesses asked if their grand jury testimony differed from their trial testimony. Far from doing what he could have done to make out a showing of particularized need, petitioner apparently proceeded on the premise that, once it was shown that the government's witnesses had testified before a grand jury, there was an automatic right to disclosure of that testimony. This, we submit, is not the rule of law which this Court has approved.

B. This Court has consistently adhered to the view that there are important public policies which make it "indispensable" to maintain the secrecy of grand jury proceedings (*United States* v. *Johnson*, 319 U.S. 503, 513; see, also, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233) and that this secrecy is not to be broken except when there is a showing of "compelling necessity" in specific "instances" which "must be shown with particularity," *United States* v. *Procter & Gamble*, 356 U.S. 677, 682. As most recently stated in *Pittsburgh Plate Glass Co*, v. *United States*, 360 U.S. 395, 400, the "burden * * * is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy." As the Court further stated, there is no "absolute right" to disclosure (p. 401); the matter is one committed to the "discretion" of the trial judge, who is to determine whether "the ends of justice require" disclosure (p. 400).

We do not contend that a defendant must establish inconsistency between trial and grand jury testimony as a prerequisite to obtaining disclosure of the latter. See *Pittsburgh Plate Glass* case, *supra,* at 401. We do believe, however, that the defense must do what is available to it in the discharge of its "burden" to show a "particularized need," and that accordingly the petitioner in this case was obliged to interrogate the government's witnesses with a view to ascertaining (1) whether they had testified before the grand jury as to the particular episodes which became significant at the trial and (2) whether, if so, they claimed that their grand jury testimony was the same as their trial testimony. This was not done.

C. We disagree, moreover, with petitioner's contention that the various demands which it made in the trial court were appropriately limited. They were not demands for grand jury testimony bearing on those particular matters which became important or crucial at the trial; rather, they were demands (with one exception) for all testimony given before all grand juries "in which the witness gave testimony related to the subject matter of his testimony in this proceeding" (R. 118; see, to similar effect, R. 132, 448, 487).

In relation to the witness Gardner, the defense ultimately modified its broad demand so as to restrict its request to grand jury testimony involving two significant episodes (R. 677–678). It is to be noted in this connection, however, that Gardner did not testify before the grand jury in this proceeding but

before a grand jury which returned an indictment in another case (see R. 679). It is true that petitioner became a defendant (along with numerous others) in that case as well, and that the charge there was a conspiracy to violate Section 9(h). But the trial of the conspiracy case had not begun at the time that the instant case was in progress (the conspiracy case did not in fact come to trial until November 1959), and it is certainly a relevant factor from the standpoint of the district court's exercise of discretion that petitioner's counsel (who was also of counsel in the conspiracy case) was seeking to breach the secrecy of grand jury testimony presented in a proceeding which was still in its pretrial stages. Compare *United States* v. *Procter & Gamble, supra.*

D. There is a further significant factor to consider in determining whether the trial court abused its discretion—namely, whether there was a manifest need for the disclosure of grand jury testimony in light of the fact that the defense had already obtained, for impeachment purposes, access to numerous statements of the government's witnesses (see R. 141–145, 252–253 (Eckert); R. 656–658 (Gardner); R. 780–782 (Mason)) produced pursuant to 18 U.S.C. 3500, and to transcripts of other proceedings at which the witnesses in question had testified (see *e.g.*, R. 131–133, 155–156 (Eckert); R. 498–499 (Gardner); R. 687–689 (Mason)), including the transcript of this petitioner's first trial.[28] The short of it is that the three government witnesses were on

[28] The record is replete with references to the testimony of these witnesses at the first trial.

record, over a period of years, as to the matters on which the defense sought to impeach them. Their statements and testimony on other occasions did not show material inconsistencies, but merely the kind of variation which one might expect of a witness being called upon to recall many details. The Court of Appeals, following a full and careful appraisal of the record, concluded (R. 927–928):

> * * * In view of prior statements of these witnesses made available to the defense, in which there appeared no suggestion of material inconsistency, it is unlikely that their statements to the grand jury occurring at a time between the giving of such statements and consistent statements upon trial would produce impeaching material. Appellant shows inaccuracies in the testimony of the witnesses (i.e. Gardner thought he had testified in another case the prior week but actually it was two weeks earlier; Eckert had testified on seven previous occasions against Mine-Mill but his testimony as to details was not precisely the same on each occasion; Gardner's evidence at trial was not shown on the reports which he made to the F.B.I.; Mason stated to the F.B.I. that he was "unable to enlarge" on information about appellant, but at trial gave other specific information); these inaccuracies might well give rise to argument concerning the witnesses' memories and powers of observation which were available to the defense from the materials produced by the government. They do not demonstrate a reason for believing that the witnesses' testimony was biased or im-

peachable on material fact. They do not compel the conclusion that the testimony before the grand jury requires further investigation.

We submit that, in view of the liberal production of materials accorded the defense, the court below was warranted in concluding that it was within the discretion of the trial court to refrain from granting access to a mass of grand jury minutes in this and other proceedings.

E. Petitioner argues that, whether or not the defense was entitled to direct production of the minutes which it sought, the trial judge, at a minimum, was required to act favorably on petitioner's alternative request, *i.e.*, that the judge examine the minutes *in camera* and then direct production to the defense in the event that his examination revealed inconsistencies. It is apparently petitioner's view (see Br. 40) that the trial judge must undertake a study of the grand jury testimony of a prosecution witness whenever the defense requests it. Petitioner also suggests that this is the rule which has been adopted in the Second Circuit.

We doubt that the Second Circuit has gone so far as to impose an automatic duty upon the district court to delve into the grand jury proceedings whenever the defense requests it. Doubtless, its practice has gone beyond that of the other circuits. Nonetheless, it has indicated on repeated occasions that the district judge does have a measure of discretion in the matter. *United States* v. *Perlman*, 247 Fed. 158, 161 (the "right [of the court to inspect grand jury minutes] should be sparingly exercised"); *United States*

v. *Alper,* 156 F. 2d 222, 226; ("Whether the power should be exercised lies, like other matters pertaining to the conduct of a trial, within the court's discretion. * * * If the witness's grand jury testimony is very lengthy, it would be an intolerable burden and would unduly delay the trial to require the judge to go through it on the mere chance that some inconsistency favorable to the accused might be found. * * * The duty * * * is particularly one about which it would be unsafe to generalize."); *United States* v. *McKeever,* 271 F. 2d 669, 672 (the defense is entitled to request *in camera* inspection "if there appears to be some basis for supposing that his grand jury testimony may be at variance with his trial testimony").

In all events, the concept of an automatic requirement is incompatible with this Court's clear statement that the burden of showing a particularized need is on the defense and that the determination whether this burden has been met is one for the informed discretion of the district judge. *Pittsburgh Plate Glass Co.* case, *supra,* 360 U.S. at 400. To depart from this precept and to require the trial judges of the federal courts to examine all of the grand jury testimony of the prosecution's witnesses in every instance where that is requested by the defense in the bare hope that something might turn up would impose upon district judges, whose energies are already heavily taxed, a most onerous burden. To go through extensive transcripts in other proceedings, to study and absorb the testimony fully and to attempt to evaluate the possible significance of variations or nuances—this obviously would impose a most demanding task. If this had to

be done regularly and automatically by the presiding judge, it could not fail to cause constant and time-consuming interruptions in the conduct of criminal trials. The matter is accordingly one of considerable moment, quite apart from the merits of this case. We urge the Court that, whatever it may conclude on the question of whether there was an abuse of discretion on the particular facts of this case, it is important to the expeditious administration of justice in the trial courts that the district judges retain a broad measure of discretion in matters of this kind.[29]

VIII

THE MOTIONS FOR A NEW TRIAL WERE PROPERLY DENIED

In Nos. 3 and 71, petitioner challenges the trial court's rulings denying two successive motions for a new trial, one filed while the main case was pending on appeal to the Court of Appeals (R. (3) 2–6), the other filed after the conviction had been affirmed by the Tenth Circuit (R. (71) 2–3). Both motions were based on alleged newly discovered evidence and both relate to evidence that the witness Gardner had made inconsistent statements on various matters on other occasions.

A. *The First Motion for a New Trial.*—The principal basis for the first motion for a new trial is that Gardner testified, in the course of another case

[29] Of course, for the reasons previously stated under points A–D, we do not believe that there was an abuse of discretion here in denying either of petitioner's requests, *i.e.*, the request for direct production to the defense or the request for preliminary examination by the court.

(*United States* v. *West, et al.*),[30] that he had never been in the armed forces. Following the conclusion of *West*, the defense counsel in that case ascertained that Gardner had been in the armed forces. See the Statement, *supra*, pp. 24–25. On that basis, the *West* defendants moved for a new trial.

At a hearing held in the *West* case (see *United States* v. *West, et al.*, 170 F. Supp. 200 (N. D. Ohio)), it was shown that Gardner had enlisted in the Army in 1922, at the age of 15; that he concluded this enlistment in 1925; and that he reenlisted in January 1926, deserting several months later. Gardner testified at the post-trial hearing in the *West* case that during World War II he had consulted with attorneys (one of whom was an attorney for defendants in the *West* case) as to getting his old military record "cleared up," and that he had been advised to "forget it" (170 F. Supp. at 205). He further testified that he interpreted the question propounded at the *West* trial (as to whether he had been in the armed forces) as a question directed to the matter of military service during World War II. The court credited this explanation, noting that it was "not likely that Gardner would attempt to conceal and falsely testify to something which he believed was within [the] knowledge" of defense counsel (170 F. Supp. at 206).[31]

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[30] The *West* defendants have petitioned this Court for a writ of certiorari (Nos. 93, 73 Misc. and 74 Misc.), raising, *inter alia*, the question whether a motion for a new trial was properly denied in that case. These petitions are still pending.

[31] The court also made a specific finding that there was no evidence to show that the government's attorneys had any knowledge of Gardner's military service when they were trying the *West* case. 170 F. Supp. at 207.

The matter of granting a new trial on the basis of allegations of newly discovered evidence is one as to which the trial court has broad discretion.[32] There are several grounds for concluding that there was no abuse of discretion here. It is to be noted, in the first place, that the matter of Gardner's military history was not a material issue in the trial of the instant case or in the trial of the *West* case; indeed, in this trial, no question at all was addressed to Gardner on that subject. It is well settled that evidence which is merely cumulative or impeaching will not ordinarily serve as the basis for grant of a new trial.[33] Here, the relevancy of the new evidence is not only restricted in the sense that it could be useful for impeachment only; there is the added consideration that petitioner is now seeking to impeach the witness by exploration of a collateral matter which he never even sought to investigate at the trial. Finally, there is the persuasive consideration that the trial judge in the *West* case—the case in which the untruthful or inaccurate testimony was given—has conducted an extensive hearing and has concluded that such testi-

[32] See *Weiss* v. *United States*, 122 F. 2d 675 (C.A. 5), certiorari denied, 314 U.S. 687; *United States* v. *On Lee*, 210 F. 2d 722 (C.A. 2); *Winer* v. *United States*, 228 F. 2d 944 (C.A. 6); *Casey* v. *United States*, 220 F. 2d 752 (C.A. 9); *Long* v. *United States*, 139 F. 2d 652 (C.A. 10); *United States* v. *Peller*, 151 F. Supp. 242 (S.D.N.Y.); *United States* v. *Hiss*, 107 F. Supp. 128 (S.D.N.Y.).

[33] See *Mesarosh* v. *United States*, 352 U.S. 1, 9; *United States* v. *Johnson*, 327 U.S. 106; *Murphy* v. *United States*, 198 F. 2d 87 (C.A.D.C.); *United States* v. *On Lee*, *supra*; *United States* v. *Rutkin*, 208 F. 2d 647 (C.A. 3); *Pitts* v. *United States*, 263 F. 2d 808 (C.A. 9).

mony was not given with an intent to falsify. In these circumstances, we submit that there is no sound basis for concluding that the availability of the new evidence would be likely to produce a different result if the instant case were re-tried. Cf. *Berry* v. *State of Georgia*, 10 Ga. 511; *Larrison* v. *United States*, 24 F. 2d 82 (C.A. 7).

Petitioner's reliance on *Mesarosh* v. *United States*, 352 U.S. 1, and *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, is misplaced. *Mesarosh* involved a prosecution witness at a federal trial who, after his testimony in the principal case, commenced to give extravagantly improbable testimony in other cases and proceedings (352 U.S. at 4–8). The statements were in large part *material to the proceedings* in which they were made. Similarly, the *Communist Party* case involved a situation in which allegations had been made of perjury on the part of three witnesses "in other cases on subject matter *substantially like that of their testimony in the present proceedings*" (351 U.S. at 124, emphasis added). *Napue* v. *Illinois*, 360 U.S. 264, on which petitioner also relies, is not in point, for that case involved affirmative concealment of impeaching evidence by the prosecution. Here, it affirmatively appears that the government attorneys had no knowledge of petitioner's military service until after the *West* trial and the instant trial were concluded, and that, when the matter was first raised, the Government fully cooperated in ascertaining the facts.[24]

[24] Petitioner's first motion for a new trial also raised contentions that Gardner, on various occasions, had been incon-

B. *The Second Motion for a New Trial.*—The evidence advanced in support of the second motion concerned Gardner's marital history. In 1955, he gave the F.B.I. a statement (R. (71) 8–9) that he married his present wife in 1945, but had not been divorced from his first wife until 1946. In January 1958, Gardner testified, at the *West* trial, that he was divorced in the middle of 1945 and remarried "very shortly" after his divorce (R. (71) 12). At the trial in this case, he testified that he was divorced and remarried in 1946. At the hearing in *West*, as set out in the Statement, *supra*, pp. 29–30, Gardner explained that his second marriage was a common law one, and that, when he testified in this (the *Travis*) case in Denver, he decided that he had made a mistake in the *West* trial, and that 1946 was correct. He further testified at the *West* hearing that he subsequently had taken the matter up with his wife and that they had concluded it was 1945, after all.

As pointed out by the district judge who conducted the post-trial hearing in *West* (170 F. Supp. at 211), "Gardner's marriage to his present wife was a common law marriage and the relationship actually commenced shortly before the divorce from his first wife became final, on July 1, 1946, and he has lived with and supported his common law wife ever since." A person more learned in law than Mr. Gardner, a layman, might well have experienced difficulty in fixing the "effective" date of the common law marriage.

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sistent as to the date of his birth and as to his employment history during the 1920's. We have referred to these matters in the Statement, *supra*, pp. 25–26. Since petitioner has not argued these points in his main brief, we shall rely, for present purposes, upon our statement of the relevant facts.

It seems apparent, for the reasons already indicated in our discussion of the first motion for a new trial, that the discrepancy as to the date of Gardner's remarriage—a matter wholly extraneous to the issues in this case and the *West* case—could not conceivably warrant a new trial. We note additionally that petitioner knew, during the course of this trial, that Gardner had given two dates (1945 and 1946) as the date of his second marriage and that petitioner, indeed, exploited this discrepancy to the point of stating, in the jury's presence, that if the statement in the F.B.I. report was true Gardner had committed bigamy (see R. 548). It is rather astonishing to suggest that this case should now be re-tried to afford petitioner an opportunity to point out that, after the conclusion of this trial, Gardner continued to be unsure as to whether the correct date of his common law marriage was 1945 or 1946.

CONCLUSION

The judgments of the Court of Appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 3, 10, and 71

MAURICE E. TRAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The principal purpose of this reply brief is to correct several mis-statements of the record, which are important because the government's legal arguments are largely based on these erroneous factual premises. There are also a few legal issues—in particular the initial and, in our view, decisive question of venue—which call for further comment.

I. *Venue.* The government concedes (G. Br. p. 42)[1] that the offense with which petitioner is charged was "completed in the District of Columbia" by the filing of the affidavits at the main office of the National Labor Relations Board. It also concedes (*ibid.*) that the District of Columbia was "the prescribed place of filing in the case of officers of international unions" such as the petitioner.

[1]References to the government's brief are given as above ("G. Br."), to the petitioner's brief as "P. Br.", to the printed record (in No. 10 unless otherwise indicated) as "R.", and to the transcript as "Tr."

From all this it follows that the government's effort to sustain venue in Colorado under the "continuing offense" statute (18 U. S. C. 3237) must fail. Whatever weight might in other circumstances be given to the government's argument that the offense was "begun" in Colorado by mailing the affidavits, that view cannot prevail here, since the place of filing is prescribed by law as the District of Columbia. That being so, there is venue only at the prescribed place of filing. *United States* v. *Lombardo*, 241 U. S. 73, 77-78.[2]

Since the principle of the *Lombardo* and other cases[3] is plainly governing here, the government chooses to ignore it.[4] Consequently, the lower court cases relied on by the government are not in point, since in them the place of filing was not prescribed by law.[5] For the same reason,

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[2]The government endeavors to deflect the *Lombardo* case (G. Br. pp. 32 and 43) by omitting the crucial portion of the opinion. Of course, the Court's opinion does include the comments quoted in the government's brief about "a continuously moving act", but these are immediately followed by the statement that those comments are "not applicable where there is a place explicitly designated by law", as there was in the *Lombardo* case and as there is in the present case.

[3]Cited in P. Br. pp. 25-26.

[4]With the possible exception of the last paragraph of a footnote (G. Br. p. 46 fn. 16) there is no reference at all to the governing principle that where the place of filing is fixed by law, there is venue at that place only. The distinction suggested by the government between a failure to file and a false filing is discussed in P. Br. pp. 25-26. In *Bowles* v. *United States*, 73 F. 2d 772, contrary to the government's statement, a false return was involved in the third and fourth counts of the indictment.

[5]As was pointed out in P. Br. p. 26, no place of filing was prescribed either in *De Rosier* v. *United States*, 218 F. 2d 420, or *Bridgeman* v. *United States*, 140 Fed. 577, the two cases on which the government chiefly relies (G. Br. pp. 43-44). Of the other decisions cited by the government (G. Br. 44-45), five are cases where the statute explicitly punished acts other than filing or receipt. *Burton* v. *United States*, 202 U. S. 344 (agreeing to receive unlawful compensation; compare the earlier decision in the same case, 196 U. S. 283, and see P. Br. pp. 16 fn. 16 and 20 fn. 25); *Ex parte Shaffenberg*, Fed. Cas. No. 12,696 ("making" as explicitly distinguished from "presenting" a false claim); *United States* v. *Uram*,

the government's argument (G. Br. p. 42) that petitioner's affidavits were "irrevocably placed in the United States mails" in Colorado is irrelevant.[6] Petitioner's policy arguments in support of the established rule (P. Br. pp. 27-29) are greeted with silence.

II. *Grand Jury Testimony.* The government disputes (G. Br. pp. 73-74) petitioner's statement (P. Br. p. 32) that "the trial judge sustained the prosecution's objections to questions put by the defense . . . to the prosecution witnesses, the purpose of which was to ascertain whether or not they had testified to the grand jury with respect to particular episodes which they testified about at the trial . . .". Cross-examining the witness Mason, the defense asked (R. 686) whether he had testified before the grand jury "about any of these conversations with Travis that you testified on direct examination here last week?" The trial court sustained the prosecution's general objection (not, as the government states, limited to "form, scope or

148 F. 2d 187 (conspiracy to make a false housing application properly prosecuted where both the agreement and the overt acts occurred); *United States* v. *Downey*, 257 Fed. 366 (fraudulently procuring reward for apprehension of deserter); *United States* v. *Newton*, 68 F. Supp. 952, aff'd 162 F. 2d 795 (prosecution not for filing but for assisting in the preparation of a false income tax return, rightly brought where the return was prepared; dictum at p. 955 that if offense were false filing it would be indictable only at place of filing). The other two cases (*In re Palliser*, 136 U. S. 257, and *New York Central & H. R. R. Co.* v. *United States*, 166 Fed. 267) are sufficiently discussed in P. Br. pp. 17, 20 fn. 25, 24 fn. 34, and 27 fn. 40.

[6]The "irrevocable" argument would have required a contrary result in *Burton* v. *United States*, 196 U. S. 283, as well as in the *Bowles* case (*supra*, note 4) and comparable decisions cited in P. Br. pp. 25-26. As a matter of logic, a failure to file at all is even more "irrevocable" than the dispatching of a false document. In fact, the mailing of petitioner's affidavit was not "irrevocable"; quite apart from the hazard of loss in the mails, petitioner or his union might have telephoned or telegraphed the Board while the affidavits were in transit, to withdraw the request for compliance status and request that the affidavits be disregarded and returned, instead of being filed.

purpose") and ruled (R. 687) that the defense could not go into "the subject matter" of the witness' grand jury testimony. See also R. 403-04 and 538.

Obviously doubtful that these rulings were "uniformly correct" (G. Br. p. 73), the government cites (G. Br. 73-74) other parts of the record where, it is contended, the defense did not ask whether the prosecution's witnesses had testified before the grand jury "as to particular events or episodes which had become crucial at the trial." But at most[7] of these points (R. 273-74, 288-90, 352, 623-24, 757 and 759-60) the defense was then trying to ascertain whether or not the witness had made statements to government attorneys, prior to his grand jury testimony, which might be producible under 18 U. S. C. 3500 (the "Jencks" statute). In any event, it cannot be argued that the defense should have repeatedly attempted to probe the subject matter of the witnesses' grand jury testimony, in view of the trial court's exclusionary ruling (R. 687) already mentioned.

The government also contends (G. Br. pp. 75-76) that the requests for grand jury testimony were not "appropriately limited". The requests made prior to cross examination were limited to the subject matter of the witnesses' testimony on direct examination (R. 118, 136, 448 and 487). The requests made after cross examination referred specifically to the witnesses' "testimony on direct examination on these different questions" (R. 424), to "the 1956 grand jury testimony we [*sic:* should be "he"] gave about the matters he testified to on direct examination, all by definition pertaining to Travis" (R. 427), and to "this witness's testimony before the grand jury in this court in 1956 relating to this defendant Travis and particularly as

[7] In the remaining instances cited by the government (R. 155-57, 498, and 688) the questions either were preliminary or were for a purpose other than impeachment by showing inconsistency.

to the two incidents the witness testified about, one, the Canadian trip, and, two, the talk with Travis at Travis's house in Denver in June, 1953" (R. 677-78).[8] Surely these requests were sufficiently specific.

In conclusion, the government recognizes (G. Br. pp. 79-80) that the trial court's blanket refusal of all the requests for access to or *in camera* inspection of grand jury minutes might be regarded as "an abuse of discretion on the particular facts of this case", and asks that, however that issue be resolved, the Court not impose an "automatic requirement", and that "the district judges retain a broad measure of discretion in matters of this kind." Petitioner has not asked this Court to impose any "automatic requirement", and has endeavored to describe objectively the pertinent considerations (P. Br. pp. 37-41). The burden on judges and parties will be greatly relieved if prosecution counsel can be persuaded to abandon a policy of automatic opposition to defense requests for grand jury minutes,[9] and to make them available voluntarily when there is no compelling reason to the contrary.

III. *Sufficiency of the Evidence.* As proof of the falsity of the affidavits, the government relies heavily (G. Br. pp. 17-18 and 51-52) on the witness Gardner's testimony con-

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[8]The government acknowledges (G. Br. pp. 75-76) the particularity of this request, but argues that it related to testimony given before a different grand jury in the same court (which returned a conspiracy indictment in which Travis was again named as a defendant), and that this "is certainly a relevant factor from the standpoint of the trial court's exercise of discretion that petitioner's counsel (who was also of counsel in the conspiracy case) was seeking to breach the secrecy of grand jury testimony in a proceeding which was still in its pre-trial stages." However, the trial court explicitly stated (R. 680) that: "That factor didn't enter into my consideration in determination of the motion." See also the discussion of this point in P. Br. pp. 34-35 and 39 fn. 56.

[9]Cf. *United States* v. *Stromberg*, 268 F. 2d 256, 273 fn. 16 (C. A. 2), indicating that in that district prosecution counsel, at least sometimes, voluntarily make grand jury testimony available to the defense.

cerning his conversation with petitioner in the fall of 1951 (R. 443-44). In describing that testimony, the government declares that "petitioner admitted to Gardner his continued membership in the Communist Party", and that petitioner "confided to Gardner that his formal resignation from the Party in 1949 was not an actual resignation" (G. Br. pp. 17-18 and 51-52).

A reading of Gardner's actual testimony (R. 443-44) will readily disclose that the government's description is a gross distortion. Petitioner did not admit his "continued" membership in the Party after his "public resignation". He did not describe his resignation as being "formal". He did not "confide" to Gardner that his resignation was not actual, but stated that "the enemies of the Party" so recognized it.

On the point at issue in the trial, this testimony is inferential rather than direct. The government's maltreatment of the words used by the witness simply underlines the importance, under such circumstances, of the evidentiary requirements[10] which should have been but were not applied in this case, and the value of examining the testimony (if any) about the episode given by the witness before the grand jury.[11]

IV. *Admission of Prejudicial Evidence.* The witness Eckert's "expert" testimony that Communist Party policy was that its members could leave only by being expelled (R. 117-18) was concededly inadmissible unless there was evidence that petitioner knew of and accepted the alleged policy. The court below and the trial court thought that certain evidence about events prior to petitioner's resigna-

[10] *I.e.* the so-called "two-witness" perjury rule, and the rule against convictions based on un-corroborated admissions, discussed in P. Br. pp. 41-48.

[11] See P. Br. pp. 34-35 and 39 fn. 56.

tion from the Party established such a connection (R. 790 and 914-15).[12] The government now seeks (G. Br. p. 60) to support the connection by other means—to wit, the witness Mason's testimony that petitioner told him in July 1949 that the resignation had been "cleared" with "Ben Gold and the Party people in New York" (R. 463-64), and the witness Gardner's testimony about his conversation with petitioner in 1951 (R. 444-45).

Neither of the two episodes is evidence that petitioner knew about or accepted the Party's policy. If true, the Mason testimony suggests rather that the Party approved petitioner's resignation. And whatever construction is placed on petitioner's comments to Gardner in 1951, they have no reference to the Party's supposed "no-resignation" policy.

Even if this testimony were to be deemed sufficient to sustain the admissibility of Eckert's "expert" testimony, the jury should then have been instructed, as petitioner requested, that the testimony should be disregarded unless the jury was satisfied that petitioner knew of and accepted the Party policy (P. Br. pp. 53-54). The government makes no effort to justify the refusal of this instruction.[13]

V. *Erroneous Application of 18 U. S. C. 3500.* Petitioner contends (P. Br. pp. 59-63) that the trial court erroneously applied 18 U. S. C. 3500 in two respects. The government's answer (G. Br. pp. 69-72) confuses the rulings and portions of the record respectively pertinent to these contentions.

Petitioner's first contention is that the trial court declined (R. 151-55, 488-94, and 527) to follow the practice approved in *Palermo* v. *United States*, 360 U. S. 343, 354,

[12]The insufficiency of this evidence is discussed in P. Br. p. 54.

[13]Nor does the government deal with petitioner's other arguments (P. Br. pp. 52-55) on this point, such as the bearing of *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 414.

under which doubtful questions under 18 U S. C. 3500(e) are resolved by the trial court *in camera*. Instead, the trial court informed prosecution counsel that any documents which they produced would be regarded as within the scope of paragraph (e), and advised them not to produce any documents unless they were willing to have the documents so treated (R. 493-94). The prosecutor agreed to proceed accordingly (*ibid.*), and the record thus discloses the possibility that documents which should have been produced for *in camera* review under paragraph (e) and the *Palermo* rule, were not so produced.

The *in camera* cross-examination of the prosecution witnesses, referred to by the government (G. Br. pp. 69-71) in answering this contention, in fact had nothing whatever to do with this problem. It had to do with the other point at issue under 18 U. S. C. 3500—namely, whether "agent of the government" as used therein includes employees of Congressional committees and government attorneys. The trial court failed to rule on this issue, and the prosecution disclaimed all responsibility for ascertaining whether or not their witnesses had made any statements to such employees or attorneys (P. Br. pp. 62-63). When defense counsel then questioned the witnesses along these lines, the court decided that the questioning should be done *in camera* (R. 223-24).

The *in camera* questioning, therefore, had nothing to do with the first point under 18 U. S. C. 3500—that is, whether or not documents known by the prosecution to be in possession of the government were within the scope of paragraph (e). The questioning had to do with whether the witnesses had conferred with other government attorneys and congressional committee agents under circumstances that suggested the possible *existence* of reports that might be producible under 18 U. S. C. 3500.

Had the trial court ruled, as it should have, that the prosecution had the responsibility of producing any statements to other government attorneys or Congressional employees, just as to agents of the Federal Bureau of Investigation, the *in camera* questioning might well have been avoided. In the upshot, however, the prosecution was never called upon to state whether or not its witnesses had made producible statements to Congressional agents or attorneys, and that is the second error of which petitioner now complains.

VI. *Nos. 3 and 71, Motions for New Trial.* (A) In No. 3, the government's principal argument (G. Br. pp. 80-81) is that the comparable motion for a new trial in *United States* v. *West*, 170 F. Supp. 200 (N. D. Ohio, pending here on petitions for certiorari, Nos. 73 and 74 Misc. and No. 93), was denied after hearing. The ground of denial was that Gardner believed that his desertion from military service in 1926 was known to defense counsel in the *West* case, that therefore Gardner would have been unlikely to falsify deliberately, and that he had probably interpreted the question put to him in the *West* case as directed only to the period of the Second World War, during which he did not render military service.

The denial of the motion for a new trial in the *West* case is not, of course, *res adjudicata* as against the petitioner. But the *West* ruling is not even a valid precedent for the present case, since the record in this proceeding shows different and additional circumstances.

The record in No. 3 destroys the credibility of Gardner's explanation, embodied in his testimony during the hearing on the motion for a new trial in the *West* case. For that record shows (R. 4, 31-32, and 45) that Gardner not only falsely denied his past military service in the *West* case, but also in answer to questions put to him by

agents of the Federal Bureau of Investigation. Whatever the plausibility of Gardner's explanation of his false testimony in the *West* case, that explanation is totally inapplicable to his questioning by the Bureau. Accordingly, unlike the record in the *West* case, the record here shows that Gardner falsified his military past not once but twice, and that his explanation in the *West* case is itself, in all probability, equally false.

(B) In No. 71, the government seeks to explain (G. Br. pp. 84-85) Gardner's multiple versions of his two marriages on the ground that anyone in his situation might well have difficulty in establishing the "effective" date of his common-law marriage to his second wife. This explanation misses the point. Confusion might, to be sure, lead Gardner to give an incorrect date, but it could hardly explain his giving four different and inconsistent statements of the sequence of marital events. Nor does the government's explanation cover the discrepancies about the date of his divorce, and this was a matter that presented no unusual complications.

It is true, as the government points out (G. Br. pp. 82-83), that neither Gardner's military nor his marital history was at issue in the trial of this case. However, Gardner's testimony concerning his conversations with the petitioner is the core of the prosecution's evidence, and therefore the question of Gardner's credibility was crucial. Under these circumstances, the new evidence on which the motions in Nos. 3 and 71 were based might well have had a decisive

impact on the jury, and the denial of those motions was an abuse of discretion.

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